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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1118

EXQUISITE FORM BRASSIERE, INC., A Corporation,
Petitioner

v.

FEDERAL TRADE COMMISSION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

FEDERAL TRADE COMMISSION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Exquisite Form Brassiere, Inc., a corporation, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on July 2, 1965.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals is as yet unreported; it is printed herein as Appendix A.

JURISDICTION

The decision of the Court of Appeals for the District of Columbia Circuit was entered on July 2, 1965. (R. 456.) Judgment was entered in this case on July 9, 1965. (R. 460.) A timely petition for rehearing *en banc* was denied October 14, 1965. Justice Stewart granted petitioner's motion for an extension of time within which to file a petition for certiorari to and including March 14, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

The statutory provisions involved are Sections 2(b) and 2(d) of the Clayton Act, 38 Stat. 730 (1914), as amended by the Robinson-Patman Act, 49 Stat. 1526 (1936), 15 U.S.C. §§ 13(b), (d). (Appendix B).

QUESTIONS PRESENTED

1. Whether the decision of the Court of Appeals is in conflict with the decision of the First Circuit Court of Appeals in the case of *Forster Mfg. Co.* v. *Federal Trade Commission,* by requiring petitioner to possess specific foreknowledge of each of its competitors' actions, thereby extending the reasonable businessman standard established by this Court in *Federal Trade Commission* v. *A. E. Staley Co.*

2. Whether the Federal Trade Commission, affirmed by the Court of Appeals for the District of Columbia Circuit, erred in its formulation of the standard which must be met by a seller in establishing a Section 2(b) of the Robinson-Patman Act defense to a Section 2(d) finding, by holding that petitioner could not demonstrate that it was meeting its competition on a plan-meeting-plan basis.

Whether, in making a good faith meeting of competition defense under the Robinson-Patman Act, the petitioner herein has been denied Due Process of Law and a fair hearing where it has been:

(a) required to make out its defense four years after the Federal Trade Commission has established its *prima facie* case, and up to nine years after the happening of the actions in question, the delay being occasioned by the erroneous denial by the Commission of petitioner's right to rebut the finding of a violation of Section 2(d) of the Act by demonstrating that its actions were good faith attempts to meet competition under Section 2(b) of the Act, and

(b) denied the right to cross-examine the witnesses relied upon by counsel supporting the complaint in establishing the *prima facie* case of discrimination when eliciting evidence in regard to its 2(b) defense.

Whether the Commission erred in refusing to regard a "push money" payment aggregating $13.53 in value as *de minimus* and in refusing to dismiss the charge to the extent it rested upon this single act; and whether the Court of Appeals erred in failing to consider and decide this issue.

STATEMENT OF THE CASE

This case has a rather long history. It began in 57 when the Commission issued a complaint alleging at petitioner, a brassiere manufacturer, had, during e period 1954-1957, violated Section 2(d) of the ayton Act, as amended by the Robinson-Patman ct. Subsequently the complaint was amended to inide charges of violations of Section 2(e) of that

Act.[1] Specifically the complaint charged that through the use of cooperative advertising plans petitioner paid promotional allowances to some of its customers for advertising services or facilities, but did not make those promotional allowances available on proportionally equal terms to all customers competing in the resale of its products [the 2(d) violation], and that petitioner had furnished to some of its customers "the services and facilities of special personnel known as 'stylists' to assist in the resale of its products", but had failed to furnish such services or facilities to all of its competing customers on proportionally equal terms [the 2(e) violation].

Hearings were held between June and December 1958; the hearing examiner filed his initial decision on January 28, 1960, holding that petitioner had violated Sections 2(d) and 2(e). The examiner rejected petitioner's proffered "good faith meeting of competition defense" available under Section 2(b) of the Act, finding that it was not available in defense to the Section 2(d) charge, and that even though it was available as a defense to the 2(e) charge, petitioner had not made out its defense.

Petitioner appealed to the Commission. The Commission affirmed the hearing examiner. In reaching its conclusion that petitioner had violated Section 2(d) and 2(e), the Commission also construed Section 2(b) of the Act as being available against Section 2(e) charges, but not as against 2(d) charges.

Thereafter petitioner appealed the Commission's decision to the Court of Appeals for the District of Columbia Circuit. The Court of Appeals reversed the

[1] 49 Stat. 1526 (1936), 15 U.S.C. 13 (d), (e) (1964).

Commission's ruling on the nonavailability of the Section 2(b) defense in a 2(d) case, and affirmed the Commission's decision in all other respects.[2] The court then remanded the case to the Commission "to afford our petitioner an opportunity to present [the] defense under Section 2(b)". 301 F. 2d at 506. The Federal Trade Commission sought review of the Court's decision in this Court by way of certiorari, but the petition was denied, with Justice Black noting that he would grant the petition. 369 U.S. 888 (1962) (Justices White and Frankfurter not participating).

Thus on June 6, 1962 more than four years after the complaint and up to nine years after certain of the alleged violations, the Commission remanded the proceeding to the hearing examiner to allow petitioner an opportunity to attempt to make out its Section 2(b) defense. Hearings were held and evidence adduced and on March 15, 1963 the examiner issued a "Revised Initial Decision after Remand" (JA 188),[3] in which he concluded that petitioner had not made out the Section 2(b) defense.

On appeal, the Commission affirmed the examiner (JA 201). Petitioner again sought review of the Commission's decision in the Court of Appeals. The Court of Appeals affirmed, with opinion, the Commission's

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[2] Exquisite Form Brassiere, Inc. v. Federal Trade Commission, 301 F. 2d 499 (D.C. Cir. 1961). See *The Exquisite Form Case and the Applicability of the Meeting Competition Defense to Section 2(d) of the Robinson-Patman Act,* 48 Va. L. Rev. 574 (1962).

[3] Joint Appendix (hereinafter JA). Ten copies of the Joint Appendix used in the Court of Appeals in its second review of this case have been filed in this Court. One copy of the joint appendix utilized in the first review by the Court of Appeals has been certified as part of the record before this Court.

decision. *Exquisite Form Brassiere, Inc.* v. *Federal Trade Commission,* — F. 2d — (1965). (Appendix A). (Petition for rehearing *en banc* denied). The court failed in this decision to pass upon several of the issues proposed for its consideration, including the question of whether petitioner's payment of $13.53 in push money to a favored customer was *de minimus* and whether the Section 2(d) charge resting on this single act should be dismissed.

This petition for certiorari is concerned only with the Section 2(d) charge, and the question of petitioner's rebutting such charge by demonstrating that its discriminations were "made in good faith" to meet the allowances for services or facilities made by its competitors to the customers who were favored by petitioner's discriminatory cooperative advertising payments and its push money payment.

During the period of time covered by the complaint, petitioner had in effect a cooperative advertising "plan", the terms of which changed from time to time.[4] The geographical area within which counsel

[4] From August 30, 1954 to January 25, 1956 Exquisite maintained a cooperative advertising plan providing for payment of sixty percent of the cost of advertisements pertaining solely to Exquisite's products placed by a retailer in certain recognized newspapers, provided that the advertisements were not less than four hundred lines. If five such advertisements were placed within a six-month interval, payment of seventy percent of the cost of each was provided. Eight advertisements within a similar interval resulted in the payment of eighty percent of the cost of each. On January 26, 1956 the lineage requirement of four hundred lines was reduced to two hundred. Thereafter, Exquisite paid fifty percent of the cost of one advertisement. For successive advertisements within a three-month period, Exquisite paid sixty percent of the cost for two, seventy percent for three, and eighty percent for four. After July 1, 1957 Exquisite agreed to pay only fifty

supporting the complaint in the original 1958 hearings sought to establish an offense was the three-city area of Patterson, Plainfield and Trenton, New Jersey. The hearing examiner, affirmed by the Commission and the Court of Appeals, found that petitioner's cooperative advertising plans were discriminatory in several respects—first, the plans discriminated against smaller customers because they could not afford to advertise on a large enough scale to be able to take advantage of the plans, and second, that discrimination resulted from petitioner's periodic departures from the plans. It was also found that petitioner had failed to make known to some if its customers the terms of its plans, and that others who at one time had been informed of the existence of the plan had not been informed of subsequent changes in the plans.

As noted, petitioner finally was permitted to put in its Section 2(b) defense in late 1962 at the hearings on remand, this occurring some four years after complaint counsel had established his *prima facie* case. Petitioner moved at the outset of the second hearing that the examiner either have the witnesses relied on by counsel supporting the complaint produced, strike their testimony, or dismiss the Section 2(d) charge to the extent it rested upon cooperative advertising prac-

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percent of the cost of all advertisements, regardless of the number placed. These allowances generally took the form of credit on future purchases of petitioner's products. Those customers who did not participate in cooperative advertising, i.e., the smaller stores which could not afford it, were offered a "premium plan", under which they could accumulate one point for each $10.00 worth of petitioner's products purchased. When a customer cumulated thirty points, he became eligible for certain premiums or prizes. This alternative plan was not in effect at all times between 1954 and 1957. Petitioner informed its customers of the existence and terms of the plans both through the trade journals and through oral notice given by its salesmen. (JA 170-73).

tices. This motion was denied, as was petitioner's interlocutory appeal therefrom to the Commission.

Thereafter petitioner attempted to make out its defense, in spite of the tremendous disadvantage it was suffering because of the fact that witnesses were no longer available, memories had dimmed, and because many of the books and records necessary to prove its defense were no longer available. (JA 330). Petitioner argued its case on two alternative bases: First, that this Court's decision in *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945) and subsequent Court cases construing *Staley,* did not necessarily preclude a seller in making out his Section 2(b) defense from attempting to demonstrate that other competitors in the industry also were offering cooperative advertising allowances pursuant to their own plans, and that petitioner, a latecomer to the industry, had fashioned its plan in a good faith attempt to meet the competition of these other sellers; and secondly, that whether the first basis is accepted or not, petitioner had, in the instances where discrimination was found, been responding to previous advertisements run by these customers which were paid for by petitioner's competitors, petitioner's response constituting a good faith attempt to meet its competitor's specific ad-by-ad allowances.

The hearing examiner, Commission and Court of Appeals found that petitioner had not made out the defense. The decision of the Court of Appeals, which this petition seeks to have reviewed by way of certiorari, held that petitioner could not meet competition on a plan-meeting-plan basis, that petitioner had not shown sufficient foreknowledge of its competitors' actions to satisfy the *Staley* standard, and that petitioner's evidence proffered to demonstrate that it was

meeting competition in specific individual instances was insufficient to support its contentions in this regard.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals, affirming the Commission, is in conflict with the decision of the First Circuit Court of Appeals in *Forster Mfg. Co.* v. *Federal Trade Commission,* 335 F. 2d 47, *cert. denied,* 380 U.S. 906 (1965), with respect to the "foreknowledge" that a seller must have of his competitor's activities before he can be said to be meeting his competition in good faith. This requirement of "foreknowledge" has been engrafted upon the Section 2(b) meeting of competition defense *sua sponte* by the Federal Trade Commission. This case has also been concerned with other aspects—both procedural and substantive—of the standard of proof a seller is required to meet in making the Section 2(b) defense. This Court has never before considered the question of the application of the good faith meeting of competition defense to a case where discrimination in the payment of allowances for services or facilities has been found.

The question of the applicability of the defense, and what a seller must do to prove it is also an important one to businessmen who utilize cooperative advertising and who must attempt to comply with the sometimes "elusive" requirements of the Robinson-Patman Act. It is also important to the antitrust bar whose members must interpret the Act for these businessmen. Finally, the case presents the Court with an opportunity to review the approach and attitude of the Commission toward the defense generally, and to consider the question of whether it has functioned

properly, as an expert administrative agency, accordingly to its legislative mandate.

The Commission's hostility to the meeting competition defense has been frequently remarked upon by courts and commentators alike.[5] It is necessary before considering the specific questions presented to examine briefly the Commission's negative attitude toward the defense, both for what it augurs for the present proceeding and for the defense in general.

This case would not be in the Supreme Court today if it were not for the fact that the Commission took an overly restrictive and highly tenuous view of the applicability of the Section 2(b) defense to a Section 2(d) violation at the outset of these proceedings. Despite the clear language of Section 2(b) and that of Section 2(d) and despite the fact that the legislative history clearly demonstrates that the defense was to be available to a Section 2(d) charge,[6] the Commission steadfastly refused to allow petitioner an opportunity to make out its defense. Even when ordered by the Court of Appeals to allow petitioner the opportunity to try to make its defense, the Commission and hearing examiner continued this restrictive and illiberal attitude, which severely prejudiced petitioner throughout the rest of this case. This must be well noted at the outset and must be seen in the context of

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[5] E.g., Dilks, *Meeting Competition Defense Under Robinson-Patman*, The Business Lawyer, Vo. XXI, No. 2 (Jan. 1966); Note, *Meeting Competition*, 113 U. Pa. L. Rev. 715 (1965); *FTC Position on Meeting Competition Defense*, Trade Reg. Rep. ¶ 50166 (Nov. 23, 1962); Adelman, *The Consistency of the Robinson-Patman Act*, 6 Stanford L. Rev. 3 (1953); Hally, *Meeting Competition Defense in Robinson-Patman: FTC* v. *the Courts*, Boston Coll. Ind. & Comm. L. Rev. 201; Note, 66 Yale L.J. 935 (1957).

[6] Exquisite Form Brassiere, Inc. v. Federal Trade Commission, 301 F. 2d 499, 504 (1961).

the Commission's attitude toward the defense as a whole, because it has colored and adversely affected these whole proceedings.

In view of the somewhat checkered history of the Section 2(b) defense at the hands of the Commission, it is not surprising that petitioner has encountered grave difficulty in making such defense.[7] Indeed, one

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[7] The Commission has repeatedly sought to limit the effectiveness of the Section 2(b) defense by taking a restrictive attitude toward it. Thus in Standard Oil Co. v. Federal Trade Commission, 41 F.T.C. 263, 281-83, the Commission sought to limit the defense by making it an evidentiary consideration rather than a complete defense, only to be reversed by this Court, 304 U.S. 231 (1951); by refusing to allow the defense to respondents charged with a Section 2(d) offense, Henry Rosenfield, Inc., 52 F.T.C. 1535, only to be reversed by two courts of appeals, Exquisite Form Brassiere, Inc. v. Federal Trade Commission, 301 F. 2d 499 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 888 (1962); Shulton, Inc. v. Federal Trade Commission, 305 F. 2d 36 (7th Cir. 1963); by limiting the defense to the retaining of old customers and not to gain new customers, Sunshine Biscuits, Inc., CCH Trade Reg. Rep. ¶ 15,469 (1961), *rev'd*, 306 F. 2d 48 (7th Cir. 1962). The FTC chose not to seek certiorari and yet issued a public statement that it would not follow the Court of Appeals' decision. CCH Trade Reg. Rep. ¶ 50,166 (Nov. 23, 1962); by finding that area-wide price concessions are unlawful, Forster v. Federal Trade Commission, CCH Trade Reg. Rep. ¶ 16,243 (1963), rejecting dictum to the contrary in General Gas Corp. v. National Utilities of Gainsville, 271 F. 2d 820 (5th Cir. 1959); a seller may only "meet" but must not "beat" his competition, Samuel H. Moss, Inc. v. Federal Trade Commission, 148 F. 2d 378 (2d Cir. 1945); that a seller utilizing the defense must establish that his competitor's price was for merchandise comparable in quality of materials and construction to the merchandise offered by the seller, Callaway Mills Co., CCH Trade Reg. Rep. ¶ 16,800 (1964), upsetting a contrary holding in Balian Ice Cream Co. v. Arden Farms Co., 231 F. 2d 356, 366 (9th Cir. 1955); competitive price being met must be a lawful one; Tri-Valley Packing Assn., CCH Trade Reg. Rep. ¶ 15,893 (1962), *rev'd on other grounds*, 329 F. 2d 694 (1964); the seller must have specific foreknowledge of the actions of his competitor, Forster, *supra*, *rev'd*, 335 F. 2d 47, 53-54 (1st Cir. 1964), *cert. denied*, 380 U.S. 906 (1965).

of the Commission's own members recently had occasion to speak out against the Commission's abuses in administrative adjudication with respect to the Section 2(b) defense.[8] Specifically, Commissioner Elman criticized the Commission for its tendency to abdicate its function as an expert administrative agency in a particular case in order to lay down or fulfill broad policy objectives which may or may not have particular reference to the case under consideration. The Commission has adopted the role of an advocate and has used the devices of advocacy in cases where it is supposed to be adjudicating as an administrative fact finding body. As will become even more clear as the following points are developed, this is just such a case.

I

Conflict With the Forster Decision

Petitioner has argued its defense throughout on two alternative bases: First, that a seller is not precluded from making out the Section 2(b) defense because it has adopted a plan to meet the plans of its competitors in the industry (discussed under II, *infra*); Secondly, that petitioner has, insofar as it is able under the peculiar circumstances of this case, demonstrated that in those specific instances where discrimination was found, it was making a good faith attempt to meet the payments for cooperative advertising previously made by a competitor (i.e., meeting competition in individual competitive situations).

In order to demonstrate that it had been meeting competition in good faith in the individual specific

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[8] House of Lords, 3 CCH Trade Reg. Rep. ¶ 17,437 (Dkt. 8631, 1966) (Commissioner Elman, dissenting).

situations where discrimination was found, petitioner introduced a table listing ads of its competitors which had been run by the stores wherein discrimination by petitioner had been found. (JA 221). These ads had been paid for in part by petitioner's competitors and had been run a short time before these buyers ran the discriminatory ads paid for in part by petitioner. Petitioner was thus attempting to show that prior to its own ads competitors had paid for ads, and that petitioner's ads were nothing more than a good faith attempt to meet those of its competitors. In so doing, petitioner was attempting to comply with what it believed to be the mandate of *Federal Trade Commission,* v. *A. E. Staley Mfg. Co.,* 324 U.S. 746 (1945), i.e., this Court's statement therein that

> the statute at least requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor . . . 324 U.S. at 759-60.

Given petitioner's knowledge of the general terms of the offers or plans of its competitors, which were generally well known in the industry (JA 190; 278), and its knowledge of the fact that the ad had been run (knowledge that was available to anyone who could read), its response to the competitive challenge was, it believed, that of a reasonable and prudent businessman attempting to meet competition. The hearing examiner, affirmed by the Commission and the Court of Appeals, ruled that this evidence was not sufficient to demonstrate that petitioner was meeting its competition, *because there was no evidence demonstrating petitioner's specific foreknowledge of the actions of*

its competitors in placing the ads which preceded petitioner's ads. (JA 211).

Petitioner had maintained during the hearings that it did not have to show specific knowledge of the actions of its competitors under the *Staley* reasonable and prudent businessman standard (JA 247), and that it would be unfair to hold petitioner to such a difficult standard given the peculiar circumstances surrounding petitioner's opportunity to make out its defense. However, the hearing examiner, while pretending allegiance and rendering lip service to the *Staley* standard, broke the hope of that promise by steadfastly requiring that petitioner meet a more stringent standard, i.e., that petitioner demonstrate that it had specific knowledge prior to paying for its own discriminatory ads of a prior ad to the same customer, the name of the competitor paying for the other ad, the amount of the competitor's allowance, and the date of the ad.

Shortly after the close of the record by the hearing examiner, the Commission decided the case of *Forster Mfg. Co.* v. *Federal Trade Commission,* CCH Trade Reg. Rep. ¶ 16,423 (Dkt. 7207, 1963). In its *Forster* decision, the Commission, considering the question of the degree of knowledge a seller must demonstrate in order to sustain the Section 2(b) defense in a Section 2(a) price discrimination case, held that, (as quoted in 355 F. 2d at 55):

> a seller, to establish the defense must ascertain in advance of his cut in price not only the competitor's price he purports to be meeting but also the identity of the competitor offering the lower price. . .
>
> . . . to establish the § 2(b) defense the seller must have proof positive before its cut in price of the amount of competitive offers and the names of bidders who made them.

Immediately after the Commission's decision in the *Forster* case, but before the examiner's decision, petitioner made a motion to the hearing examiner to reopen the record so that petitioner could adduce evidence sufficient to meet the Commission's *Forster* standard, which petitioner believed to be an enlargement on or addition of a "new dimension" to the *Staley* reasonable and prudent man standard—the standard prevailing during the hearings. The examiner denied the motion to reopen and in so doing argued that,

> contrary to respondent's contention, this holding of the Commission is not novel and does not add a "new dimension" to the law, but in fact represents no change in long-established precedents. The same holding was clearly enunciated by the Supreme Court as long ago as 1945 in the Corn Products and Staley cases. (Cf. JA 211).

In affirming the examiner's denial of petitioner's motion to reopen, the Commission said that,

> in correctly denying this motion, the examiner held that *Forster,* rather than establishing a new element merely reiterated and clarified existing elements. (JA 211).

Subsequently, in its review of the Commission's *Forster* decision, the First Circuit Court of Appeals emphatically rejected this "foreknowledge" standard, characterising it as "unrealistic" since "*the requirement is stricter than that laid down in . . . Staley.*" 355 F. 2d at 55. In specifically rejecting the Commission's extrapolation on the prevailing standard the court noted:

> [O]ur 'common sense' suggests the conclusion opposite to that reached by the Commission.
>
> We may not be in as intimate touch with the ways of commerce as the Commission, but we would be

> naive indeed if we believed that buyers would have any great solicitude for the welfare of their commercial antagonist, sellers. The seller wants the highest price he can get and the buyer wants to buy as cheaply as he can, and to achieve their antagonistic ends neither expects the other, or can be expected, to lay all his cards face up on the table. Battle of wits is the rule. Haggling has ever been the way of the market place. *Forster Mfg. Co.* v. *Federal Trade Commission,* 335 F.2d 47 (1st Cir. 1964), *cert. denied,* 380 U.S. 906 (1965).

Translating the First Circuit's appraisal of the Commission's view of the good faith meeting of competition defense in a Section 2(a) case, into a payments for cooperative advertisements situation, it would find "unrealistic" a requirement that a seller show that it had specific foreknowledge prior to paying for its own discriminatory ads of a prior ad to the same customer, the name of the competitor paying for the other ad, and the amount of its competitor's allowance. Such a requirement defies the First Circuit's "common sense", as well it should. Such a standard of foreknowledge is indeed difficult of attainment. A seller simply cannot get the type information that the Commission requires. This is especially true in the Section 2(d) situation where competitors provide for cooperative advertising pursuant to multi-termed "plans", the terms of which change frequently. Further, most of the plans require that a series of ads be placed before mathematical calculation of the seller's participation with respect to any one ad is computed. *Not even the seller or his buyer may know what the final allowance is going to be.* Yet the Commission would require a seller trying to meet his competition to specifically meet the

prior offer, i.e., to know what neither his competitor or customer knows. Petitioner does not believe that the reasonable and prudent businessman standard announced in *Staley* stretches as far as the Commission would have it. Evidently the First Circuit does not believe so either.

After the Commission affirmed the examiner in the instant case, petitioner sought review of its decision in the Court of Appeals for the District of Columbia Circuit. Shortly after filing its petition for review in the Court of Appeals petitioner moved to have the case remanded to the Commission for purposes of adducing additional evidence as to petitioner's specific foreknowledge of its competitors' activities. Petitioner argued that the "foreknowledge" element of the Section 2(b) defense was a "new dimension", added after the close of the record but that the examiner and Commission were bound by the *Forster* decision in deciding the case. Petitioner argued that it rejected the Commission's enlargement on the standard, but that since both the examiner and Commission were bound by such standard in deciding the case, and since petitioner was not bound by the standard during the hearings, the record was incomplete and it would be unfair to petitioner to review the case without giving it an opportunity to adduce this additional evidence.[9] The Court of Appeals denied this motion to remand. Shortly after the denial by the Court of

[9] Although rejecting the enlargement on the standard, petitioner at all times demonstrated a willingness to attempt to meet it insofar as it was able under the peculiar circumstances of this case. *In spite of petitioner's willingness to try to meet the standard, neither the Commission or the Court would allow petitioner the opportunity.*

Appeals, as previously noted, the First Circuit announced its decision in *Forster,* reversing the Commission and vindicating petitioner's position. Immediately thereafter petitioner made another motion to the Court of Appeals, requesting that court to reconsider its denial of the motion to remand, in light of the First Circuit's *Forster* decision. This motion was also denied, without prejudice to petitioner's raising the question again in the brief and oral argument before the Court.

Although petitioner continued to make this argument before the Court of Appeals, in its decision, the Court of Appeals did not indicate specifically its position with respect to the *Forster* case. Instead, in considering the question of whether petitioner had met its competition in individual instances, the court held that petitioner had not shown how the table of its ads related to company policy. (Appendix A, p. 3a).

Specifically, the court stated that

> Exquisite also contends that, even if the doctrine of *Staley* applies, its proof satisfied the requirements of that case. The only evidence which related to individual competitive situations consisted of a table which set forth the dates of retailers' advertisements of Exquisite Form products and competitors' products. There was no testimony which explained how this table related to company policy. The Commission found that Exquisite Form's evidence was insufficient to support its contention. We agree with the Commission. *Ibid.*

The record before the Court of Appeals is replete with evidence demonstrating company policy,[10] which the court ignored. It also misapprehended the purpose of the table which was simply a shorthand formulation of extensive evidence, foundation for which had previously been laid on the record. Further, the court agreed with the Commission that "Exquisite Form's evidence was insufficient to support its contention". Since the Commission was relying upon the *Forster* standard in determining that petitioner's evidence was not sufficient, it is apparent that the Court of Appeals was applying the stricter *Forster* standard in the same manner as did the Commission. That is to say, although the Court of Appeals stated that it was considering petitioner's argument according to *Staley* (as did the hearing examiner and Commission), it is apparent that it would require a higher standard of knowledge of a seller's competitor's actions than *Staley* requires, again, in emulation of the examiner and Commission. This is apparent from both the

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[10] E.g., such evidence included the testimony of a Mr. Bertram Isaacs, Executive Vice President of the Advertising Checking Bureau, an organization employing over 600 persons throughout the country, which specializes in keeping track of specific cooperative advertisements placed in newspapers. (JA 238-57). This company was employed by Exquisite Form and the other brassiere manufacturers to keep track of both their own ads and those of their competitors. This organization had detailed knowledge of the specifics of all the plans of the manufacturers. (See JA 241; 245). It is their job to review the newspapers, compare the ads to the allowances given, and inform the manufacturers how those running cooperative ads measure up to the terms offered by such manufacturer. (JA 254). Exquisite's actions with respect to "company policy" are further demonstrated by the testimony of one of its chief executives and one of its salesmen, relating how Exquisite Form keeps itself informed as to its competitors' actions. (JA 278; 257-68).

court's opinion and its denial of petitioner's motion to remand and its motion for reconsideration. Petitioner demonstrated that it had done all it could as a reasonable and prudent businessman to learn about the actions of its competitors and to react to individual competitive situations. In view of the Court of Appeals' failure to find, in spite of the evidence adduced by petitioner under the circumstances obtaining in this case, that petitioner had sustained its defense, this court should recognize that the standard has been "misapprehended and grossly misapplied". *Federal Trade Commission* v. *Standard Oil Co.,* 355 U.S. 39 (1958).

II

Meeting Competition on a Plan-Meeting-Plan Basis

Petitioner, faced at the outset of the second hearing with the procedural problems previously noted and the restrictive attitude of the Commission toward the defense, determined that the one possible way to give the Section 2(b) defense meaning in the area of payments for services or facilities in the brassiere industry was to look at petitioner's action vis-a-vis the actions of its competitors in formulating its cooperative advertising plan in the first place. Petitioner believed this to be a proper constructional interpretation in view of the fact that the plans are designed and formulated in the first instance by competitors in relation to the plans of their competitors, and to this extent are in fact a "meeting of competition".

However, when petitioner attempted to adduce testimony and introduce evidence in support of its plan-meeting-plan theory, the hearing examiner, affirmed by the Commission, refused to allow it to do such, largely on the basis of the *Staley* case and a catalog

of Section 2(a) price fixing cases following *Staley* (JA 197; 214).[11] The view of the Commission was that *Staley* foreclosed a seller from demonstrating in the proof of his Section 2(b) defense that he was meeting the systems or plans of his competitors. Rather, the Commission relied upon *Staley* for the proposition that a seller can only make out the Section 2(b) defense by responding to competitive challenges in individual competitive situations. However, the cooperative advertising plans utilized by competitors in the brassiere industry have no relation to the pricing systems condemned in *Staley*. This Court condemned the basing point system in both *Staley* and its companion case, *Corn Products Refining Co.* v. *Fed-*

[11] To this end, petitioner attempted to introduce evidence as to the conditions which prompted it to adopt the specific terms in its plans. It attempted to show conditions prevailing in the industry which required that its plan be competitive in order to stimulate the sale of its products, including: evidence as to its relative standing in sales vis-a-vis the standing of its competitors with respect to the dollar volume of business done in the stores where discrimination was found (JA 278; 282); development of lines of inquiry which would show its national standing and that of its competitors in total brassiere sales within department stores (JA 248-50); demonstration that its competitors' plans were also not designed for small stores, and that the reason for this was that small stores simply did not generate a sufficient volume of business to make it profitable for either the store or the manufacturer to provide for cooperative advertising (JA 252); demonstration that its premium plant was designed for the small stores and intended to provide them with an alternative to the cooperative advertising granted the larger stores, and that few, if any of its competitors provided for alternatives to their plans with respect to the small stores (Cf. JA 258-59).

In each and every one of the above instances, petitioner was frustrated and denied the right to open up these lines of inquiry because the hearing examiner, affirmed by the Commission, felt that all of the above was irrelevant because *Staley* said you cannot meet a plan with a plan.

eral Trade Commission, 324 U.S. 726 (1945), because, as one of the Commissioners recently put it, "the pricing system was an illegal collusive price-fixing instrumentality". *Federal Trade Commission* v. *Calaway Mills Co.*, CCH Trade Reg. Rep. ¶ 16,800, at 21,761 (Commissioner Elman, dissenting). The Commissioner went on to point out

> that the vice in the Section 2(b) defense offered by the basing point respondents was not that they were responding to their competitors' pricing conduct in accordance with a plan or schedule, but that a basing-point plan or schedule cannot be a *bona fide* method of meeting competition, since it is intended, rather, to eliminate competition.

Clearly the plan utilized by petitioner bears no resemblance, either in theory or practice, to that condemned in *Staley* and cases which have followed *Staley*. (JA 197). The error of the hearing examiner and Commission in their mechanistic approach to the theory of meeting competition on a plan-meeting-plan basis has been their failure to distinguish between a *plan*, an offer and an acceptance. The plan is nothing more than a formalized articulation of the terms of the seller's offer to his customers of his willingness to participate in the costs of the advertising undertaken by the buyer to promote the seller's products. The fact that a seller adopts a cooperative advertising *plan* does not mean that he is foreclosed from the Section 2(b) defense because *Staley* says you cannot meet a plan with a plan. The use of the words plan or system in the abstract means nothing. It is simply the seller's

offer to his buyers. In a specific competitive situation, a seller is merely making an allowance pursuant to his existing offer. However, in order to appreciate what goes into the specific allowance made in a specific competitive situation, it is necessary to have knowledge of what has gone into the formulation of the general offer in the first place. Petitioner was frustrated in this effort by the Commission's failure to appreciate that *Staley* does not condemn plans *qua* plans. Every time the word plan has been mentioned in this case, whether to the hearing examiner or Commission, the automatic response has been that *Staley* says no. (JA 197; 214). This mechanistic jurisprudence hardly comports with the Commission's congressionally mandated obligation to function as an expert administrative agency.

Had petitioner been able to adduce the evidence it proposed to adduce under its plan-meeting-plan theory (note 11, *supra*), it would have established that petitioner's plan or offer was in fact a good faith attempt to meet the plans or offers of its competitors. And it is petitioner's good faith which is most important to the question of the Section 2(b) defense, not the fact that petitioner embodied the terms of its offer in a formal plan. *House of Lords, supra;* Note, *Meeting Competition,* 113 U.Pa. L.Rev. 726 (1965). Petitioner would also have shown by this evidence that, both in the formulation of the terms of its plan or offer and in responding to specific competitive challenges under its plan, it was responding in a manner *justified* by the competition it was meeting. This demonstration was clearly relevant both under *Staley*

and the legislative history of the Act.[12] Thus it is clear that the overly restrictive attitude of the Commission and the hearing examiner with respect to the plans-meeting-plans question prejudiced petitioner in the making of its Section 2(b) defense.

III

Denial of Procedural Due Process and a Fair Hearing

In addition to taking a restrictive, grudging attitude toward the substantive requirements of Section 2(b), the Commission, affirmed by the Court of Appeals, has carried this attitude and approach over into the procedural aspects of the defense. Specifically, petitioner believes that the Commission erred procedurally in the following respects:

1. Establishing the Section 2(b) Defense by Cross-Examination:

Petitioner moved at the outset of the hearings on remand either to have the witnesses relied upon by counsel supporting the complaint for the *prima facie* charge produced, to strike their testimony, or to dismiss the 2(d) charge to the extent it rested upon cooperative advertising practices. In support of the motion

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[12] This Court declared in its *Staley* decision that the revised language of what is the present Section 2(b) was introduced "for the purpose of making the defense a matter of evidence in each case, raising a question of fact as to whether the competition justified the discrimination". *Staley, supra* at 752-53. This analysis is consistent with the legislative history of that Act; for example, Congressman Utterback, commenting on H.R. 8442, whose language later became Section 2(b) stated: "It leaves it a question of fact to determine in each case whether the competition to be met was such as to justify the discrimination given . . . and whether the way in which the competition was met lies within the latitude allowed by these limitations." 80 Cong. Rec. 9418, June 13, 1936.

petitioner argued that but for the examiner's erroneous refusal to permit the defense in the first hearing, petitioner would have been entitled to develop this defense in the course of its cross-examination of witnesses during the presentation of the case in chief by counsel for the complant in 1958. Petitioner further argued that to deny the motion would deprive it of Due Process of law under the Fifth Amendment; that it would not comport with even the basic rudiments of administrative fair play; and that it would be contrary to the letter and spirit of the Administrative Procedure Act, 5 U.S.C. § 1006(c). ("Every party shall have the right to present his case or *defense* . . . and to conduct such cross-examination as may be required for a full and true disclosure of the facts".) In addition to these authorities, petitioner cited to the hearing examiner *his own action* in the first hearing, when he permitted petitioner to pursue its Section 2(b) defense to the Section 2(e) charge by cross-examination of complaint counsel's witnesses relied upon to support the *prima facie* charge. However, in spite of these authorities and despite the fact that the hearing examiner's own action was clearly established on the record, he disavowed this position in the remand hearings, denying petitioner the right of cross-examination. (See colloquy set out at Appendix C).

The Commission, in affirming the examiner's second decision, in effect held that petitioner had the right to develop an affirmative defense through cross-examination of complaint counsel's witnesses. *However, despite this it held that "we do not believe that the instant respondent could have supplied the missing element of its defense by a cross-examination of these particular witnesses".* (JA 220). (Emphasis added.)

The Court of Appeals, although the question was urged upon it with much vigor both in the briefs and at the oral argument, completely ignored the cross-examination question.

The Court of Appeals erred in failing to recognize petitioner's right of cross-examination in making out its Section 2(b) defense and the Commission erred in its determination that petitioner could not have made out its defense by cross-examination. The question was and is not whether the Commission thinks that petitioner could not have made out the defense, in speculating on what petitioner may have been able to prove had it had the opportunity. The question is whether petitioner had the right to such opportunity for cross-examination. The Commission did not deny that this right exists; it simply attempted to remedy the error by speculating on what *might* have occurred had petitioner had its rightful opportunity. This Court should not allow the Commission's action in this regard to go unchallenged; petitioner was denied a fundamental right and no amount of "speculation" by the Commission can change this fact. The right of cross-examination is absolutely fundamental to the making out of a defense, whether the case be criminal, civil, or administrative.[13] This fundamental right should not be sacrificed to the Commission's desire to bring about ease of administration of the Robinson-Patman Act.

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[13] Reilly v. Pinkus, 338 U.S. 269 (1949); Powhatan Mining Co. v. Ickes, 118 F. 2d 105 (6th Cir. 1941). See also 2 Davis Administrative Law § 329.

2. Staleness of the Record:

Petitioner's argument here relates to the question of the great length of time intervening between the happening of the events in question in this case and the point in time when petitioner was called upon to defend its prior actions. This great lapse of time, amounting to as much as *nine years* (1954-1963) in some instances, causes the evidence relied upon by the Commission and affirmed by the court to be denominated "cold and stale evidence". Not only was the evidence cold, dated, and stale, but petitioner was required to attempt to *tie it to a record that had been established more than four years prior to the time the defense was put into evidence!* In spite of this fact, both the Commission and the Court of Appeals refused petitioner's argument that the complaint should be dismissed because of the utter impossibility of petitioner's having a fair opportunity, under the peculiar conditions of this case, to put in its defense. Although the Commission denied petitioner this relief (JA 219), it has itself accorded it to at least three other respondents since it considered petitioner's case. Specifically, in *Bearings, Inc., et al,* CCH Trade Reg. Rep. ¶ 16,768 (Dkt. 7134, 1964) Chairman Dixon, speaking for the Commission, dismissed a complaint against the respondent because:

> during the course of our detailed examination of the record on appeal, we could not fail to be impressed by the fact that the vast majority of the evidence has to do with incidents, events and conversations the most recent of which took place in 1957. *Id.* at 21,702-03.

With the record in that proceeding in such a state, the Commission decided that "it would serve no useful

purpose to make an adjudication on a record composed as this one is of cold and stale evidence." *Id.* at 21,703. The delay in that case was six years at its greatest; *here the delay was up to nine years!* Several more recent cases of the Commission support this argument even more forcefully. The first of these is *Admiral Corp.*, 3 CCH Trade Reg. Rep. ¶ 17,230 (Dkt. 7094, 1965). This was a case which began in 1958 and which also grew out of the Commission's erroneous refusal to allow the Section 2(b) defense to a Section 2(d) charge. During protracted hearings, the respondent moved for the issuance of *subpoenas duces tecum* to its competitors for purposes of making its Section 2(b) defense to the Section 2(d) charge. The examiner, affirmed by the Commission, refused to authorize the subpoenas because the defense was held inapplicable to the 2(d) charge. However, after the decision of the Court of Appeals for the District of Columbia Circuit in the first *Exquisite Form* case,[14] the issuance of such subpoenas became proper. In considering subsequent subpoena requests, the hearing examiner held that the respondents had not renewed their requests for subpoenas in time, and consequently, the record would not be reopened. Before the Commission, the respondent argued that the 2(d) charge should be dropped because, even if the subpoenas had been issued, their issuance would in all likelihood be unproductive in view of the long passage of time. The Commission, in dismissing the Section 2(d) charge, stated that "we cannot agree that the respondent was afforded a proper and adequate opportunity to present its defense". *Id.* at 22,305. The Commission went on

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[14] *Supra*, note 2.

to make the following statement which petitioner believes to be controlling for our case:

> It cannot be denied that the respondent has been disadvantaged by the delay. The documentary evidence adduced by complaint counsel in support of their case was fresh and they had the advantage of testimony concerning events in their witnesses' very immediate past. The hearing examiner's ruling would force respondent to rebuttal with dated evidence of less reliability. Respondent's ability to defend with evidence of comparable probity and reliability has been harmed therefore *through no fault of its own* . . . it is our conclusion that *equity decrees dismissal. Id.* at 22,307. (Emphasis added.)

Petitioner's case stands on even stronger ground with respect to the above argument since petitioner was disadvantaged over an even greater length of time than the respondent in *Admiral.* In view of the Commission's decision in *Admiral,* its failure to dismiss the complaint in this case with respect to the Section 2(d) charge is a classic case of arbitrary administrative action. As such it should not be allowed to stand by this Court. See also *Beatrice Foods,* 3 CCH Trade Reg. Rep. ¶ 17,311 (Dkt. 7599, 1965) wherein the Commission held:

> The allegedly discriminatory allowances date back to 1959. Any evidence which respondent would have to adduce would in all probability not be found in written records but in the memories of witnesses which may have faded by now.
>
> We are not convinced that any useful purpose would be served *nor even that due process could be achieved* by remanding this case now to a hear-

> ing examiner six years after the facts to hear additional evidence. *Id.* at 22,472. (Emphasis added.)

Again, it must be noted that petitioner's opportunity to put in its defense did not come until up to *nine years* after the alleged offenses. Certainly the above authorities and common sense clearly demonstrate that the action of the Commission and the Court of Appeals in failing to dismiss the complaint was erroneous.

IV

Failure to Dismiss the "Push Money" Charge as De Minimus

The controversy concerning the "push money" issue centers around payments made by petitioner, at the rate of 11 cents per brassiere sold, to personnel of Rosenbaum's in Plainfield, New Jersey. The examiner, affirmed by the Commission, found that petitioner did not grant or offer to grant allowances for similar services, on proportionally equal terms, to other customers who competed with Rosenbaums.

In attempting to rebut the above findings, petitioner argued that because the Rosenbaum store had *gone out of business* during the lengthy period intervening betwen the filing of the complaint and the making of the defense, records pertinent to making out such defense were no longer available, personnel who may have taken part in such promotions were likewise unavailable, and most importantly, records which might have shown that competitors had made like "push money" allowances were destroyed. Petitioner argued further, in a motion to dismiss the push money charge (made as part of the previously mentioned motion to pro-

duce witnesses for purposes of cross-examination) that because of the unavailability of proof, petitioner was effectively deprived of opportunity to defend against this Section 2(d) charge relating to push money. The motion was denied.

Petitioner also argued that because the single push money payment aggregated only $13.53, the charge should be dismissed with respect to it because such a payment was *de minimus.* This argument was also rejected. The push money question was proposed to the Court of Appeals as question three of the questions presented in its brief. However, the court wholly failed to consider this question, even though extensive argument was made with respect to the question in petitioner's brief.

Petitioner respectfully submits that this Court should redress the failure of the Court of Appeals to consider this question by ordering the "push money" charge dropped from the complaint, either because of the prejudice caused to petitioner by the delay, or because the single $13.53 payment was *de minimus;* alternatively, this Court should remand this case to the Court of Appeals and require it to pass upon this question.

CONCLUSION

In the House of Lords decision, *supra,* Commissioner Elman stated, in a strong dissent, that the time has come for the Commission to reexamine its approach to Section 2(b) of the Act, and to bring it into harmony with the rest of the other antitrust provisions; petitioner submits that it is likewise time for this Court

to review the actions of the Commission. Wherefore the petitioner prays that a writ of certiorari be granted so that the important questions raised by this petition might be reviewed on the merits, or so that the case might be remanded to the Commission to allow petitioner its long-denied opportunity to meet the Commission's strict specific foreknowledge requirement.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18524

EXQUISITE FORM BRASSIERE, INC.,
A CORPORATION, *Petitioner*

v.

FEDERAL TRADE COMMISSION, *Respondent*

On Petition to Review an Order of the
Federal Trade Commission

Decided July 2, 1965

Mr. Peyton Ford for petitioner. *Mr. Urban A. Lester* also entered an appearance for petitioner.

Mr. Lester A. Klaus, Attorney, Federal Trade Commission, with whom *Mr. James McI. Henderson,* General Counsel, and *Mr. E. K. Elkins,* Attorney, Federal Trade Commission, were on the brief, for respondent. *Mr. Thomas F. Howder,* Attorney, Federal Trade Commission, also entered an appearance for respondent.

Before PRETTYMAN and BASTIAN, Senior Circuit Judges, and BURGER, Circuit Judge.

PRETTYMAN, *Senior Circuit Judge*: This is the second time this controversy has been in this court. It is a peti-

tion to review a decision of the Federal Trade Commission. Exquisite Form was charged with violating Section 2(d) of the Robinson-Patman Act[1] by making discriminatory advertising allowances to customers. The Commission found a violation. The company appealed to this court. We affirmed the Commission on this point.[2] However another controversy at that stage was whether or not a defense, meeting the competition in good faith, which was authorized by a proviso in Section 2(b) of the statute, was available to a person guilty of discriminating in violation of Section 2(d) of the statute, which declares it to be unlawful for a person to pay anything for the benefit of a customer for services or facilities provided by such customer, unless the payment or consideration is equally available to all other customers. The Commission had held that the defense was not available in such cases. We held that it is available and remanded the case for the Commission to hear Exquisite Form on that defense.[3] Hearing was held, and the Commission held that Exquisite Form had not established the defense by proof. The present case is on review of that decision.

Exquisite Form in the present case essentially premises its position upon the proposition that in a Section 2(d) case, if the accused company establishes that its competitors have plans or systems whereby they make advertising allowances to their customers, any company in the industry can combat such systems by inventing and operating a system or plan of its own. Exquisite Form states a number of points, but all of them arise from or are enveloped in the proposition just stated. This, as it phrases the matter, is the crux of the case. Admittedly

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[1] 49 STAT. 1527 (1936), 15 U.S.C. § 13(d) (1963).

[2] Exquisite Form Brassiere, Inc. v. FTC, 112 U.S. App. D.C. 175, 301 F. 2d 499 (1961), *cert. denied*, 369 U.S. 888 (1962).

[3] *Ibid.*

the Supreme Court has held[4] that in a price discrimination case (a Section 2(a) case) it is not an effective protection for an accused company to show that it operated a plan or system in order to combat its competitors' plans or systems; in other words, that in those cases a plan to combat other plans is not an effective defense under the proviso in Section 2(b). The Court held that in such cases the combative act had to be a specific act aimed at a lower price on the part of a competitor in "individual competitive situations, rather than * * * [in] a general system of competition."[5] Exquisite Form argues that that rule cannot apply to the advertising allowance practices in the brassiere industry, because of the factual characteristics of that industry and the practices in it.

We think the doctrine of *Staley* must be applied here. There are differences, of course, between a price discrimination (Section 2(a)) case and a case involving advertising allowances. But we are not shown that any such difference goes to the basic thesis involved in the statute or to the rationale of *Staley*. We are not shown any compelling reason for different treatment.

Exquisite Form also contends that, even if the doctrine of *Staley* applies, its proof satisfied the requirements of that case. The only evidence which related to individual competitive situations consisted of a table which set forth the dates of retailers' advertisements of Exquisite Form products and competitors' products. There was no testimony which explained how this table related to company policy. The Commission found that Exquisite Form's evidence was insufficient to support its contention. We agree with the Commission.

Affirmed.

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[4] FTC v. A. E. Staley Co., 324 U.S. 746 (1945).

[5] *Id.* at 753.

APPENDIX B

Statutes Involved

Section 2 of the Clayton Act, as amended, provides in pertinent part (49 Stat. 1526, 15 U.S.C. 13):

> (b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.
>
> (d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionately equal terms to all other customers competing in the distribution of such products or commodities.

APPENDIX C

Q. What date or approximate date did Exquisite Form Brassiere Company furnish to your store a stylist?

A. The exact date was November 13th, 1957. Miss Pearl Ringel.

Q. Is that the only time that Exquisite Form Brassiere Company furnished to Tepper's the services of a stylist?

A. Yes.

Q. At the time that the stylist was there, Miss Albanese, did Exquisite Form Brassiere Company and Tepper's Store engege in cooperative advertising which included reference to the stylist being there?

A. Yes. We received cooperation in any case.

Q. But particularly in that case? I want to know if the cooperative advertising at that time included reference to the use of the stylist?

A. Yes.

Q. And Tepper's paid part of the cost of that advertising and Exquisite Form paid part of the cost of that advertising?

A. Right.

Q. And that was in the same manner that other cooperative advertising was paid for during that year by both Exquisite Form and Tepper's?

A. Yes.

Q. Miss Albanese, what competing manufacturers of brassieres, that is, competitors with Exquisite Form, also furnished to Tepper's the use of stylists?

Mr. Dias: Your Honor, I'd like to make an objection to the introduction of what is obviously a defense of meeting competition that is arising here and I realize it's just a pro forma objection. I am aware of the ruling in the Rosenfeld case but I'd like to be able to preserve any rights I may have for future appeal or future briefing and for that reason it's my position that the meeting of competition is not a defense to a 2(e) count and for that reason, I object to this type of testimony.

Mr. Cassedy: If Your Honor please, I might as well get my position on both (d) and (e) sub-sections. I will contend that meeting competitors' advertising allowances and the services and facilities of the stylists are all defense rights of this respondent. We will contend that in furnishing cooperative advertising and the use of stylists we were meeting the practice of the industry and particularly competitors who manufactured brassieres and sold the same customers.

Hearing Examiner Piper: The objection is overruled with respect to 2(e), but you may have a continuing objection to that line of testimony in order to preserve your position.

Mr. Dias: Thank you.

Hearing Examiner Piper: As far as 2(d) is concerned, while you have not made an objection, now Mr. Cassedy has stated his position and I don't agree with it. The Commission has held that cost justification and the good faith meeting of competition are not defenses available under Section 2(d). Therefore, I will not permit testimony tending to establish a good faith meeting of competition under 2(d) but I will under 2(e).

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Admiral Corp., 3 Trade Reg. Rep. ¶ 17, 230 — 11

Beatrice Foods, Inc., 3 Trade Reg. Rep. ¶ 17, 311 — 11

Exquisite Form Brassiere, Inc. v. *Federal Trade Commission*, 301 F. 2d 499, certiorari denied, 369 U.S. 888 — 5

Federal Trade Commission v. *A. E. Staley Mfg. Co.*, 324 U.S. 746 — 6, 7, 8

Federal Trade Commission v. *National Lead Co.*, 352 U.S. 419 — 10

Forster Mfg. Co. v. *Federal Trade Commission*, 335 F. 2d 47, certiorari denied, 380 U.S. 906. — 9

Statute:

Section 2 of the Clayton Act, 49 Stat. 1526, 15 U.S.C. 13 — 2, 4, 6, 7, 8, 10, 11

216-740—66——1

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1118

EXQUISITE FORM BRASSIERE, INC., A CORPORATION,
PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–3a) is reported at 1965 Trade Cases ¶ 71,491; it has not yet been officially reported. The first decision of the Federal Trade Commission is reported at 57 F.T.C. 1036. Its decision on remand is reported at Trade Reg. Rep. (1963–1965 Transfer Binder) ¶ 16,753; it has not yet been officially reported.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 1965, and a timely petition for rehearing *en banc* was denied on October 14, 1965. On January 6, 1966, Mr. Justice Stewart granted an exten-

sion of time within which to file a petition for certiorari to and including March 14, 1966, and the petition was filed on March 14. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner proved that its discriminatory promotional allowances were "good faith" efforts to meet competition within the meaning of Section 2(b) of the Clayton Act, as amended.

2. Whether delay occasioned by petitioner's successful appeal from the Federal Trade Commission's first order denied petitioner due process.

STATUTES INVOLVED

Section 2 of the Clayton Act, as amended, provides in pertinent part (49 Stat. 1526, 15 U.S.C. 13):

> (b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.
>
> * * * * *

(d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

STATEMENT

Petitioner is a major producer and distributor of brassieres, selling to retail stores throughout the United States. In 1954 it initiated a series of cooperative advertising plans under which it made payments to some of its customers in partial reimbursement of their cost of local newspaper advertisements featuring petitioner's product (R. 204).[1] Under its original plan, which was in effect prior to 1956, petitioner paid 60 percent of the cost of single advertisements consisting of at least 400 lines. If a customer ran five such advertisements within a six-month period, however, he was reimbursed for 70 percent of his cost; and if he ran eight such advertisements, he received 80 percent (R. 204).[2]

[1] "R" refers to the joint appendix filed in the court below.

[2] The plan was subsequently amended on two occasions. In 1956, the lineage required was reduced to 200 lines, and the scale of payments for multiple advertisements was altered. In 1957,

In 1957, the Federal Trade Commission issued a complaint alleging that Exquisite, in making payments for cooperative advertising, as well as certain payments of "push money" to employees of a few customers, had violated Section 2(d) of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. 13(d) (R. 4–9).[3] After full evidentiary hearings, the Commission in 1960 issued its decision, in which it found violations of Section 2(d) both in petitioner's payments for cooperative advertising and in the "push money" payments.[4] At that time, the Commission took the position that the "meeting competition" defense of Section 2(b) was inapplicable in a Section 2(d) proceeding, and it therefore did not permit petitioner to introduce evidence to establish such a defense. The Court of Appeals for the District of Columbia Circuit affirmed the Commission's findings and conclusions that petitioner had *prima facie* violated Section 2(d), but held that petitioner should have

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the plan was changed to provide an allowance of 50 percent for each 200-line advertisement with no increase for multiple advertisements (R. 204).

[3] The complaint was subsequently amended to include an allegation that petitioner violated Section 2(e) of the Act as well. The Commission's finding of Section 2(e) violation was affirmed by the court of appeals and is no longer at issue in the proceeding.

[4] The Commission found, for example, that petitioner's cooperative advertising allowance plan was "inherently discriminatory" because its terms were unsuitable to the needs of many smaller customers; that the plan was not even offered to some customers in competition with favored customers; that some customers who were informed of the plan were not told of subsequent changes in it; and that petitioner did not abide by the terms of its plan—giving some customers larger allowances than the plan called for, and others smaller allowances (see R. 205–208).

been allowed to prove that its discriminatory allowances had been made in good faith to meet competition. *Exquisite Form Brassiere, Inc.* v. *Federal Trade Commission,* 301 F. 2d 499, 506, certiorari denied, 369 U.S. 888.

On remand, the Commission opened the record and gave petitioner a full hearing on its defense. At the hearing, petitioner introduced in evidence a list of advertisements of competitors' products placed by seven of the many customers it had favored with discriminatory allowances. The list had been compiled strictly for use in the Commission proceeding—by going through old newspapers (R. 210). Petitioner argued that this compilation demonstrated that the advertisements of its products followed and were in response to advertisements of competing products. The Commission, however, found that such evidence was equivocal and incapable by itself of demonstrating that petitioner's payments to the favored customers were knowing responses to competitors' offers (R. 210–212).

Next, petitioner contended that, in general, its cooperative-advertising allowance plan had been adopted in good faith to counter similar plans of competitors (R. 213–214). In support of this contention, petitioner introduced evidence regarding the basic terms of the cooperative advertising plans that its competitors had had in effect at the time of its payments to the favored customers (R. 215). The Commission noted, however, that even if this contention were correct, petitioner could not prevail, having failed to inform some customers of the existence of the plan,

having failed to adhere to the terms of the plan in actual performance (R. 207–208), and having failed to show that its payments under the plan were necessary responses to the actions of competitors in particular competitive situations (R. 213–214). The Commission went on to reject the contention itself. The Commission found that since petitioner's plan was more discriminatory than any competitor's and was apparently used as an offensive tool to enlarge petitioner's market share rather than as a defensive measure, the plan was not a "good faith" effort to meet competition (R. 218).

In addition to finding that petitioner had failed to prove its 2(b) defense, the Commission found that petitioner had been afforded a fair opportunity to establish the defense, thereby rejecting petitioner's contention that the Commission was required to recall all the witnesses who testified at the original hearing so that petitioner might attempt to establish its affirmative defense through cross-examination. The Commission further concluded that petitioner had not been unreasonably hindered in its defense by the lapse of four years between the time that the complaint was originally issued and the hearing on remand, when it was first permitted to put on its case (R. 219–220).

The Commission's cease and desist order was unanimously affirmed on appeal to the Court of Appeals for the District of Columbia Circuit (Pet. 1a–3a). The court of appeals relied upon this Court's decision in a Section 2(a) price-discrimination case, *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U.S.

746, for the proposition that lawful meeting of competition is limited to "a specific act aimed at a lower price on the part of a competitor in 'individual competitive situations, rather than * * * [in] a general system of competition.'" (Pet. 3a.) It saw no reason why the same rule should not apply to advertising allowances in a Section 2(d) case. The court agreed with the Commission's conclusion that the list of competitors' advertisements, unexplained by any testimony, was insufficient to demonstrate that petitioner's discriminatory allowances had been made to meet competition in individual competitive situations as required by *Staley*. The court did not discuss petitioner's claims that due process required the Commission to recall all of the witnesses for cross-examination by petitioner's counsel and that delay had deprived petitioner of a fair opportunity to present its defense.

ARGUMENT

The decision below is clearly correct, and further review is not warranted.

1. The standard by which the Commission judged petitioner's "meeting competition" defense was that of *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746. In that case this Court stated (324 U.S. at 759–760) that a successful Section 2(b) defense

> * * * at least requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the

> granting of a lower price would in fact meet the equally low price of a competitor. * * *[5]

This standard is a factual one, and this Court in *Staley* emphasized that the "appraisal of the evidence and the inferences to be drawn from it are for the Commission, not the courts." (324 U.S. at 760.) In the present case, the Commission found (R. 209) that petitioner did not have the requisite knowledge of competitors' offers when it made the challenged advertising payments to favored customers. The court of appeals upheld these findings. Their correctness is not an issue warranting consideration by this Court, and in any event it is not open to serious question.

Petitioner's effort to demonstrate its awareness of the existence of comparable offers by its competitors rested solely upon general evidence that advertising allowances are commonly granted retailers in the industry, coupled with evidence that seven of the favored customers had in fact placed advertisements featuring products of other brassiere manufacturers (Statement, *supra,* p. 5). Such evidence indicated nothing, however, about petitioner's *awareness* of competitors' offers to the favored customers; there was absolutely no evidence that petitioner knew these customers were receiving allowances and reasonably believed that it must meet such allowances. Indeed, it is possible that petitioner itself, not any of its competitors, in fact initiated co-operative advertising payments to the customers in question. The Commis-

[5] It is not contended that the meeting-competition defense is essentially different when advanced in a discriminatory-allowance case under Section 2(d), as here, rather than a price-discrimination case under Section 2(a), as in *Staley* (Pet. 14).

sion was thus entitled to reject petitioner's showing as wholly equivocal and unpersuasive (R. 212).

The Commission's opinion makes clear that the defects in petitioner's showing of good faith extended far beyond the mere inability of petitioner to identify the particular competitor whose offer it was meeting and to specify the precise amount of that offer. Accordingly, petitioner's reliance on *Forster Mfg. Co.* v. *Federal Trade Commission,* 335 F. 2d 47 (C.A. 1), certiorari denied, 380 U.S. 906, is misplaced. Although the court in *Forster* held that it would be "unrealistic" to require the seller to show knowledge of the precise amount offered and the particular competitor offering the lower price (335 F. 2d at 56), it did not question the requirement of *Staley* that the seller demonstrate *some* knowledge of comparable offers by competitors prior to offering a discriminatory allowance. No such knowledge was shown here.

It is surely no answer for petitioner to argue that its plan was designed to be generally responsive to similar plans of its competitors. For, as the Commission found, petitioner completely failed to inform many of its customers of the existence of its co-operative advertising program (R. 207–208) and on a number of occasions granted some customers a greater allowance, and others a smaller allowance, than they were entitled to under the formal terms of its plan (R. 205–206); further, petitioner's plan, considered as a whole, went substantially beyond any competitor's in discriminating against small customers (R. 216–217). The plan in short was not tailored to actual competitive need and was more discriminatory than

competition warranted. As the Commission concluded, a discriminatory plan "adopted as a general competitive measure to secure a larger share of the market and unrelated to a particular competitive situation is not within the protection of the Section 2(b) defense" (R. 214, citing this Court's *Staley* decision, 324 U.S. at 753, and *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419).

2. Petitioner's procedural contention—that it was denied a fair opportunity to establish its Section 2(b) defense—is without merit. It complains first of the Commission's refusal to recall in the remand hearing the witnesses "relied upon by counsel supporting the complaint for the *prima facie* charge" (Pet. 24). During the course of the proceedings on remand, the Commission's examiner ruled that petitioner must be responsible for calling whatever witnesses it wished to rely upon, using the same compulsory process available to counsel supporting the complaint (R. 236–237). Petitioner requested no subpoenas and made no showing that witnesses were unavailable. Its complaint is thus in essence that it had a right to establish a meeting-competition defense through cross-examination of complaint counsel's witnesses who testified on the distinct issue whether petitioner's allowances were *prima facie* unlawful under Section 2(d). But questions as to whether the favored customers had also received offers from sellers in competition with petitioner would have been outside the scope of their direct testimony. In the circumstances, it was perfectly reasonable to require petitioner, rather than the Commission, to take the ini-

tiative in recalling the witnesses by whom petitioner sought to establish its affirmative defense.

Petitioner next complains that it was denied a fair opportunity to present its Section 2(b) defense because of the lapse of time between the conduct challenged in the complaint and the Commission proceeding on remand. The Commission itself has expressly recognized that there may be cases in which such delay may so prejudice a party's ability to defend itself as to require dismissal of its complaint, in whole or in part (see *Admiral Corp.*, 3 Trade Reg. Rep. ¶ 17,230; cf. *Beatrice Foods, Inc.*, 3 Trade Reg. Rep. ¶ 17,311). But it correctly found that this was not such a case. Lapse of time does not necessarily preclude an effective defense, and petitioner in the present case made no showing that any prejudice actually resulted here—that witnesses were not available or could not be located, or that their memories were bad, etc.[6]

[6] Petitioner did attempt to make a specific showing of prejudice in one minor aspect of the case: it contended that the one customer that had received "push money" payments had gone out of business and its records were no longer available. Even here, however, petitioner offered no explanation why its own records and the testimony of its own officials would not be adequate. Petitioner's alternative contention (Pet. 30–31) that the Commission was required to dismiss the "push money" charge as *de minimis* was first raised after the initial court of appeals decision, which affirmed all of the Commission's findings of *prima facie* violation, and is in any event fully answered in the Commission's opinion, which notes (R. 220) that the "push money" payments, while small, were "part and parcel of sales transactions and other advertising grants to this favored retailer which were clearly not *de minimis*." In addition, the point is largely moot since the Commission's finding of violation with respect to the "push money" payments did not affect the scope of the cease and desist order that it entered (R. 202).

By its very nature this was a defense best provable by the testimony and records of petitioner's officers, and no showing was made as to how and why the delay made such proof difficult or impossible.

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1118

EXQUISITE FORM BRASSIERE, INC., a Corporation,
Petitioner

v.

FEDERAL TRADE COMMISSION, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent's brief in opposition misses much of the thrust of the petition for certiorari, largely fails to meet the issues raised therein, and gives an overall impression of "why bother" in the first place. It is submitted that the respondent's cursory and almost

casual treatment of the issues raised in this case should not cause the Court's attention to be distracted from the important questions of first impression presented by this petition. At this point petitioner urges this Court to consider the points in issue in a more meaningful and informed manner than have either the respondent or the court and Commission below.

Before beginning a point-by-point refutation of the brief in opposition, petitioner desires to raise at the outset two propositions: First, that the brief in opposition completely misconstrues the *Forster* decision (see discussion *infra,* at pp. 9-12) and wholly ignores the conflict with the decision of the Court of Appeals. Second, that the respondent is way wide of the mark in its argument that petitioner was not denied Due Process by the failure of the Commission to allow petitioner to make out its Section 2(b) defense through cross-examination of the witnesses relied upon to establish the Section 2(d) violation (see discussion *infra* at pp. 13-16).

1. Respondent states at the outset of its argument that since the Court of Appeals upheld the findings of the Commission in this case, they are either not open to challenge or, if open to challenge, their correctness is "not open to serious question by the Court". (R.Br., p. 8) The simple answer to this contention is this Court's holding in *Federal Trade Commission* v. *Standard Oil Co.,* 355 U.S. 39 (1958) that lower court and Commission action in Robinson-Patman Act cases is always open to scrutiny where such action "misapprehends and grossly misapplies" a standard under the Act. This is precisely what petitioner is alleging has occurred in the instant case, both at the Commis-

sion and Court of Appeals levels, and the findings relating to such action is therefore open to review by this Court.

2. In its counterstatement of the case, respondent, in emulation of the Court of Appeals, states that petitioner's table of competitors' advertisements, "unexplained by any testimony, was insufficient to demonstrate that petitioner's discriminatory allowances had been made to meet competition in individual competitive situations . . . ." (R.Br., p. 7). Respondent also refers to the table of ads in a rather uncomplimentary manner as having "been compiled strictly for use in the Commission proceeding—by going through old newspapers (R. 210)". (R.Br., p. 5). Petitioner has difficulty in understanding why the table of ads and its relevance to these proceedings has been misunderstood first by the Court of Appeals and now the respondent. Although petitioner dealt with this point in the petition (p. 19; see especially Note 10), fuller explanation is now called for in order that this Court not be mislead by the respondent's failure to appreciate the table's significance.

During the course of the hearings after remand, petitioner did its best to make out its Section 2(d) defense by calling those favored customers who were still available and by quizzing these customers as to ads run by them and paid for by petitioner's competitors, which ads had been run by the favored customers shortly before they had run the discriminatory ads paid for by petitioner. (JA 301-16). The purpose of placing the ads in the record was to demonstrate that prior to petitioner's discriminatory ads competitors had previously paid for ads run by the favored customers. At the close of the hearings, petitioner de-

sired to formulate a shorthand method for presenting this otherwise unwieldy evidence in an easily understandable format. Petitioner decided that the easiest way to accomplish this was by a table of ads, giving the name of the store running the ad, the date of the prior competitor's ad, the name of such competitor, and the date of petitioner's ad placed in an attempt to meet the competitive challenge afforded by the competitor's ad. (See Table, JA 221). Admittedly this table was checked against the "old newspapers" which had run the ads in the first place. However, this was not an ex post facto rationalization of previous conduct as the respondent would apparently have it, but rather simply an attempt on the part of petitioner to present a graphic illustration of its actions vis-a-vis those of its competitors.

The statement that the table was "unexplained by any testimony" is simply wrong, and demonstrates a basic misunderstanding of the table, both in relation to its source and its purpose. (See Pet., p. 19, Note 10, for references to evidence which explained the ads making up the table.)[1] Respondent continues this misunderstanding in its Argument, p. 8, where it states that "there was absolutely no evidence that petitioner knew these customers were receiving allowances and reasonably believed that it must meet such allowances". Respondent further argues that petitioner's evidence did not demonstrate an "awareness" of its competitors' offers to the favored customers. (R., p. 8) And finally, respondent argues that petitioner did not demonstrate even "some" knowledge of its competitors' actions. (R.Br., p. 9).

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[1] This table is based upon the testimony elicited from competitors and salesmen who were called to appear at the hearing on remand.

The table of ads itself stands as the most obvious refutation of respondent's various statements. There is no question that the prior competitor ads were in fact run.[2] Nor can there be any doubt that petitioner had knowledge of them. It had such knowledge, first, as a reasonable and prudent businessman who keeps abreast of what its competitors are doing in the marketplace (e.g., JA 190, 278), i.e., as a manufacturer who reads newspapers and has direct communication with customers through salesmen; and second, by virtue of its utilization of the Advertising Checking Bureau which kept petitioner informed both as to the accuracy and commercial efficacy of its own ads and which kept petitioner informed of the ads run and paid for by its competitors.

Further, respondent's characterization of petitioner's evidence completely ignores the procedural hardships under which petitioner was laboring in this case. Having first been denied the right to elicit its defense through cross-examination, and then having been required to make the defense four years after the *prima facie* case was established and up to nine years after the happening of the events in question, a reasonable approach would have been to dismiss the complaint, or at the very least not hold the petitioner

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[2] Further, there can be no doubt that the ads which were run were cooperative ads, i.e., paid for in part or in whole by the manufacturer. Cooperative advertising is a commercial way of life in the brassiere industry (JA 304) and it is indeed the rare ad which is not at least partially paid for by the manufacturer. It is also not open to question that petitioner did not initiate cooperative advertising in the industry, but rather, as a latecomer in the industry, it adopted a long-established trade practice. For example, Warner's has employed cooperative advertising since the turn of the century. (JA 339).

to a stricter evidentiary requirement with respect to a subjective subject like foreknowledge.[3]

3. In considering petitioner's awareness or foreknowledge, respondent also ignores the practical marketplace difficulties which confront a seller in a Section 2(d) situation, as opposed to the market situation under Section 2(a).[4] Petitioner admits at the outset of this analysis the existence of a certain affinity between Sections 2(a) and 2(d). In fact, Section 2(d) found its genesis in a felt need to broaden the proscriptions of Section 2(a). (*Cf.* Patman, *The Robinson-Patman Act,* 38 (1st ed. 1938)). Both are generally designed to preclude the anticompetitive evils attendant upon discrimination (in whatever form) by a seller between his buyers.

However, there are distinct differences between the two sections. For example, Section 2(a) provides a seller with a "cost justification" provision which allows him to negative any inference of discrimination by showing that the different prices accorded two competing buyers is justified on the basis of genuine cost savings. There is no such "cost justification" provision in Section 2(d). The absence of such a justification in the "payments for services or facilities" section

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[3] The petitioner has throughout these proceedings, since the Commission's decision in *Forster,* sought the opportunity to introduce additional evidence which would satisfy this strict evidentiary standard. The Commission and the court have denied the petitioner this opportunity.

[4] Respondent's attempt (p. 8, n. 5) to read out of this case petitioner's contention on this point is a little too eager. This point was alluded to by the Court of Appeals in its decision (App. A, p. 2a) and briefly treated by petitioner in its petition. (Pet., p. 16).

has been rationalized on the basis that price discriminations "could be more readily detected and . . . it would be much easier to make accurate comparisons with any cost savings." (Baum, *The Robinson-Patman Act,* 143).

Apparently, therefore, even though a violation of Section 2(d) is no more commercially offensive than a 2(a) violation, the reason for sustaining a charge of a 2(d) violation without regard to competitive injury is because of the *difficulty of inquiring into the terms of the allowances made.* This difficulty is especially pertinent in the cooperative advertising context, since each competitor makes its payments pursuant to a "plan", each containing numerous factors, terms and conditions. This "difficulty of measurement" feature which inheres in 2(d) situations is not apparent in a 2(a) context, where a certain nice mathematical certainty obtains. Dollar-for-dollar differences can be readily and easily measured. Not so the multiple terms and conditions of the various cooperative advertising plans obtaining in the brassiere industry.

It is petitioner's contention that, by a parity of reasoning, the different considerations obtaining in determing *if* a violation exists in a 2(a) context as opposed to that of 2(d) should also be accorded significance in determining if the meeting competition defense has been sustained, i.e., since mathematical certainty is not attainable in finding a 2(d) violation, as it is in finding a 2(a) violation, this factor should be given significant weight in determining what is required to make out the Section 2(b) defense to a Section 2(d) discrimination finding and in determining what relevance Section 2(a) criteria have in the 2(d) situation.

If the problem is approached from this direction, rather than from the Commission's and the Court of Appeals' mechanistic application of Section 2(a) criteria, it becomes readily apparent that the Section 2(a) criteria only have limited relevance in the Section 2(d) area. Neither the respondent in its brief nor the Commission or the court in their opinions made this distinction; they failed to recognize the "difficulty of measurement" problem and what it argues for this case.

Further respondent's brief ignores the difficulties facing a seller in attempting to obtain knowledge of his competitors' actions. It also fails to recognize the problems presented by the necessity for interpretation once he does learn of his competitors' actions. If he were simply meeting *prices,* the determination would be simple, since it is an elementary arithmetical task to compare a number of prices to see which is the lowest. It is a radically different task to undertake a meaningful mathematical comparison of the cooperative advertising "plans" offered by petitioner's competitors in this case, or a specific allowance made pursuant to a plan. The record reflects the details of at least seven manufacturers' plans, each with multiple terms or conditions, some containing entirely unique features. (JA 215). It is evident that no pat mathematical basis exists for comparison of these plans such as is available in the Section 2(a) situation. Therefore, for the 2(b) defense to have any relevancy in the 2(d) area something less than the specific foreknowledge required under 2(a) should be demanded. What that something is has not been settled and it is a question open for this Court's consideration and resolution.

4. On page 9 of its brief, respondent gives cursory consideration to the *Forster* case and finds petitioner's reliance thereon misplaced. Respondent completely ignores the existence of a conflict between the *Forster* decision and the decision of the Court of Appeals in the instant case. Although petitioner referred to the *Forster* case and its relevance for this case at great length in the petition (Pet., pp. 14-20), respondent either misunderstands or simply chooses to ignore petitioner's argument on this point. In order that the point at issue not be obscured, petitioner deems it necessary to now reiterate (albeit reluctantly) in summary form its argument on this question.

a. During the hearings after remand, petitioner and the hearing examiner were at odds concerning the standard to be applied in a Section 2(b) applied to Section 2(d) case. Petitioner argued that *Staley* and all other Section 2(a) price discrimination cases had only limited relevance in a Section 2(d) case, and that a lesser degree of specific knowledge of competitors' actions should be required because of the difficulties faced in the marketplace by a seller in meeting competition in a Section 2(d) context. The hearing examiner believed that *Staley* controlled, and argued that petitioner was required to prove that it had specific foreknowledge of each and every action of its competitors' in each specific individual competitive situation. (*Compare* JA 247-48 *with* JA 265). Petitioner argued that *Staley* did not go that far and that even if it did, such knowledge should not be required in a Section 2(d) case. Petitioner believed that the examiner was engrafting an added dimension on *Staley* while pretending allegiance to that standard.

b. Shortly after the close of the record by the hearing examiner (after the hearings on remand), the Commission handed down its first decision in the *Forster* case (*Forster Mfg. Co.*, CCH Trade Reg. Rep. ¶ 16,423 (Dkt. 7207, 1963)). In its decision the Commisison articulated for the first time a specific foreknowledge requirement in a Section 2(a) price discrimination case.

c. Shortly after the Commission's *Forster* decision, petitioner made a motion to the hearing examiner to reopen the record to allow petitioner an opportunity to adduce evidence as to petitioner's specific foreknowledge of its competitors' actions. Petitioner stated that it believed the Commission's formulation of the standard in *Forster* to be wrong and an enlargement on the *Staley* reasonable and prudent businessman standard, but argued that since this new dimension had not been in existence at the time petitioner was making out its defense at the remand hearings, and since the examiner (who had not as yet made his final decision) and Commission would be bound by the stricter standard in deciding the case, it would not be fair to petitioner and would deny it Due Process to fail to reopen the hearings to give petitioner an opportunity to meet the more stringent foreknowledge standard. The hearing examiner denied petitioner's motion, stating that the Commission's *Forster* decision was not an added dimension to the *Staley* standard, but rather "in fact represents no change in long-established precedents. The same holding was clearly enunciated by the Supreme Court as long ago as 1945 in the . . . Staley case". (Pet., p. 15).

d. In appealing the examiner's decision to the Commission, petitioner requested at the outset that the Commission require the examiner to reopen the record to give petitioner an opportunity to meet the more stringent *Forster* standard. The Commission refused petitioner this relief and in its decision affirming the examiner's decision, the Commission held that there was in fact no difference between *Staley* and *Forster*. (Pet., p. 15).

e. After petitioner filed its petition for review in the Court of Appeals for the District of Columbia Circuit, it made a motion to that court to have the case remanded to the Commission in order that petitioner might be given a chance to meet the more stringent *Forster* standard. Petitioner argued that although it disagreed with the commission's *Forster* decision, petitioner was not bound by that standard when it put in its evidence at the hearings on remand, but both the examiner and Commission were bound by the more stringent standard in deciding the case. The court denied the motion to remand.

f. Shortly after the court denied the motion to remand the First Circuit Court of Appeals handed down its decision reversing the Commission's *Forster* case on the foreknowledge question. The court held that the Commission's formulation of the standard was "stricter than that laid down in . . . *Staley*", and that the Commission's standard "defied common sense". 355 F. 2d at 55.

g. On the strength of the First Circuit's decision, petitioner immediately made another motion to the Court of Appeals, this time to reconsider the

court's previous denial of the motion to remand. Petitioner reiterated its previous arguments with the addition of the argument that the First Circuit's decision vindicated petitioner's position in the present case, and that it would be unfair to have petitioner have its case decided by the court without giving petitioner an opportunity to meet the more stringent standard which both the examiner and Commission had applied. The court denied this motion.

h. Before the Court of Appeals, petitioner reiterated all of the arguments previously noted with the additional argument that if the court affirmed the Commission's decision, i.e., if it approved the Commission's formulation of the standard, the result would be that the Court would be in conflict with the First Circuit Court of Appeals on the "foreknowledge" question. *In affirming the Commission's decision, the Court of Appeals did not even refer to the Forster decision, but rather held that petitioner had not met the Staley standard.* In its decision, the Court noted that it agreed with the Commission that "Exquisite Form's evidence was insufficient to support its [defense]". (App. A, p. 3a). Since the Commission was relying upon the *Staley*-as-enlarged-upon-by-*Forster* standard in determining that petitioner's evidence was not sufficient, it is apparent that the Court of Appeals was applying the stricter *Staley*-as-enlarged-upon-by-*Forster* standard in the same manner as did the Commission and the examiner. It is thus apparent that the Court of Appeals would require a higher standard of knowledge of a seller's competitors' actions than *Staley* requires. *In so requiring, it*

is in direct conflict with the First Circuit and this Court should grant this petition so that the conflict can be settled,[5] *and so that guiding criteria can be established in the Section 2(b) as applied to Section 2(d) situation.* See *supra* at page 2.

5. Respondent's argument (pp. 10-11) on the question of petitioner's having been denied the right of cross-examination defies characterization. It ignores: (1) That the hearing examiner had ruled in the first hearing (when petitioner was putting in a 2(b) defense to a Section 2(e) charge, which at that time was held to be a valid defense) that a petitioner could make out the 2(b) defense by cross-examination; That the Commission affirmed this ruling in its first decision; That the Commission, in considering petitioner's arguments in the second hearing did not deny the fact that the right existed—in fact, it admitted as much (JA 220), even though it went on to speculate that even if petitioner had had the opportunity for such cross-examination, it did not believe that petitioner could make out the defense.

Respondent argues in the face of this authority that (1) Petitioner failed to show that these witnesses were unavailable and requested no subpoenas to determine whether they were available; and (2) That in any event

[5] If this Court agrees with the standard as formulated by the Commission and affirmed by the Court of Appeals, this case should be remanded to afford petitioner an opportunity to meet the more stringent standard. Petitioner has reiterated its willingness throughout to try to meet the standard, although protesting that it is more stringent than is required under *Staley,* but neither the Commission nor the court would give it this opportunity. If, on the other hand, this Court agrees with petitioner that the standard has been misapprehended and misapplied, it should grant the petition in order to establish just what the standard should be.

the question whether the favored customers had received offers or payments from petitioner's competitors was outside the scope of the direct examination by complaint counsel in establishing that petitioner had in fact made the discriminatory payments to the favored customers.

In the first place, petitioner did make a showing that some of the witnesses were no longer available. While petitioner did not specifically state such in its motion to strike, produce witnesses or dismiss, it argued such to the examiner (JA 237, 279) and the thrust of the motion itself was that the long delay precluded petitioner from being able to produce such witnesses. In the second place, petitioner did subpoena those witnesses who were still available[6] to attempt to establish the defense (contrary to the respondent's statement at R. Br., p. 10) and some witnesses were in fact no longer available (e.g., JA 316). In the third place, to argue that petitioner would have been precluded at the first hearing from making out its defense by cross-examination, had the defense been available, on the basis that such was outside the scope of the direct testimony is to exult sophistry over common sense reasoning. We are dealing here with a twentieth century administrative proceeding, not a trial in a nineteenth century common law court. To argue as outside the scope of direct testimony a petitioner's examination of a favored customer concerning whether such customer had, prior to receipt of petitioner's discriminatory ad, run an ad paid for by one of petitioner's competitors, is to argue the ridiculous. Certainly, if petitioner's ads were

[6] The only witnesses available were Mrs. Vitale (JA 299) and Mr. Biblowitz (JA 311). The answers to interrogatories of Mrs. Robert Scerbo (JA 342) and Mr. S. Carl Mark (JA 345) were read into the record.

in fact run in response to previous ads by its competitors, the action of the favored customer vis-a-vis petitioner's competitor would be of the very essence of not only the defense but also the discrimination. If the competitor's previous action was in fact what triggered petitioner's ad in response, then the actions of the favored customer must be examined both with relation to petitioner's discriminatory ad and with respect to the competitor's previous ad. This is not outside the scope of the direct testimony (even assuming such a highly technical nonadministrative evidentiary ruling were proper here); it is of the very essence of the direct testimony and respondent's attempt to make it anything else falls of its own unsupported (and unsupportable) weight.

The gist of the matter is that petitioner has been denied a fundamental right and no amount of ex post facto rationalizing by respondent can change this fact. Further the Commission's conjecture or speculation as to what petitioner could or could not do, which conjecture and speculation was affirmed, *sub silentio* by the Court of Appeals, should not be allowed to go unreproved. Petitioner does not believe it comports with either Due Process or administrative fair play to be conjectured out of court—petitioner prefers to have its rightful opportunity to make out its defense by way of cross-examination.[7]

6. Finally, respondent argues that even though the Commission has recognized in three cases occurring after the instant one that shorter delays in time than is present in the instant case were sufficient to prejudice

[7] A right also guaranteed in administrative hearings by Administrative Procedure Act, 5 U.S.C. § 1006(c).

a party in making out his defense, it was perfectly proper for the Commission, affirmed by the Court of Appeals, to withhold such relief in the present case. It argues such on the basis that petitioner made no showing that it was prejudiced by such delay.

First, if it takes something more than common sense to recognize that a delay of from four to nine years prejudices a party in making out what the Commission and court held to be a subjective-oriented defense, petitioner has in fact shown that something more by specific evidence. Petitioner invites the Court's attention to JA, pp. 329-30, 333, 357 for specific instances supporting this argument. But respondent's argument is founded upon an even more glaring error. *In none of the three cases cited by petitioner* (Pet., pp. 27-30) *did the Commission even examine into the question of whether the particular petitioner had made a showing of prejudice because of the passage of time.* For example, in the *Beatrice Foods* case cited by petitioner, the Commission stated that

> "evidence which respondent would have to adduce would in all probability not be found in written records [i.e., because they would no longer be available] but in the memories of witnesses which may have faded by now . . . We are not convinced that any useful purpose would be served nor even that due process could be achieved by remanding this case now . . .". 3 CCH Trade Reg. Rep. at pp. 22, 472.

The opinion of Chairman Dixon in the *Bearing* case cited in the Petition at page 27 is precisely to the same effect.

It is fundamentally unfair to expect more of petitioner whose rights were delayed an even greater

length of time, especially where such delay was the direct result of the Commission's overly-restrictive attitude toward the defense in the first place.

For the reasons stated petitioner requests that the Court grant the writ of certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1118

EXQUISITE FORM BRASSIERE, INC., a Corporation,
Petitioner

v.

FEDERAL TRADE COMMISSION, *Respondent*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

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EXQUISITE FORM BRASSIERE, INC., a Corporation,
Petitioner

v.

FEDERAL TRADE COMMISSION, *Respondent*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Exquisite Form Brassiere, Inc., prays that this Court grant rehearing of its order of May 31, 1966 denying the Petition for Writ of Certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the District of Columbia Circuit in the above-entitled cause as prayed for in the Petition filed March 14, 1966 in this proceeding.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

1. Subsequent to this Court's Order of May 31, 1966 denying the Petition for Certiorari herein, the Court of Appeals for the Fifth Circuit on June 13, 1966 rendered decisions in the cases of *Callaway Mills Co. et al.* v. *Federal Trade Commission* (No. 21499) and *Cabin Crafts, Incorporated* v. *Federal Trade Commission* (No. 21500) in a joint opinion.[1] This opinion is of substantial and controlling importance and represents a direct conflict with the decision of the Court of Appeals for the District of Columbia Circuit in *Exquisite Form,* the instant case.[2]

The Fifth Circuit in the two cases alluded to above was called upon to construe the meeting competition defense of Section 2(b) of the Clayton Act, as amended by the Robinson-Patman Act. The Circuit Court of Appeals for the District of Columbia in the instant case had the same task. Both courts were called upon to determine the propriety of adopting a plan or system to meet competition posed by competitors' plans or systems. Unlike the District of Columbia Court of Appeals, the Fifth Circuit specifically ruled that Section 2(b) *does allow the adoption of a system or plan* and such system or plan may properly be insulated from any illegality by virtue of the meeting competition defense.

The basis of the conflict existing between the two circuit courts turns upon the proper construction of

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[1] The joint opinion in these two cases is reprinted in Appendix A, *infra.* The opinion has not yet been reported.

[2] The opinion of the Court of Appeals for the District of Columbia Circuit is reprinted in Appendix B, *infra.* The opinion has not yet been reported.

this Court's decision in *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945) and related cases. The Fifth Circuit in *Callaway Mills* rejected the interpretation of *Staley* adhered to by the Commission; however, the Commission's interpretation was upheld by the Court of Appeals in the instant case. Specifically, the Fifth Circuit stated that

> "We have found no authority which holds that in all circumstances the allowance of volume discounts according to a plan or 'system' as distinguished from 'individual competitive' responses is condemned per se. Clearly this is not a 'basing-point' case. *FTC* v. *Standard Oil Co.* 355 U.S. 396 (1958). It is only when no 'reasonable and prudent person' would conclude that the adopted system is a reasonable method of meeting the lower price of a competitor that it is condemned. That decision must be made on a case-by-case basis. The adoption of the competitor's system in *Staley* and *Cement* had the effect of raising prices to certain purchasers through 'phantom' freight charges and thus creating *greater* discrimination than necessary. Obviously, that was not a 'good faith' effort. Such is not the case here. Under the totality of the circumstances, the discount system, *thoughtfully tailored by both petitioners to meet their individual problems in the market,* was a mature and reasoned approach to a very real and difficult competitive problem; and petitioners carried their burden of showing 'good faith'." Slip Opinion, pp. 15-16; Appendix A, *infra,* pp. 13a-14a (emphasis in original).

The Circuit Court for the District of Columbia viewed the issue treated above as controlling all of the issues presented by Exquisite Form's appeal:

> "Exquisite Form in the present case essentially premises its position upon the proposition that in

> a Section 2(d) case, if the accused company establishes that its competitors have plans or systems whereby they make advertising allowances to their customers, any company in the industry can combat such systems by inventing and operating a system or plan of its own. Exquisite Form states a number of points, but all of them arise from or are enveloped in the proposition just stated. This, as it phrases the matter, is the crux of the case." See Appendix B, *infra,* p. 19a.

In passing on this issue, the court of appeals in *Exquisite Form* adopted, in a summary fashion, the "traditional" interpretation of *Staley* as espoused through the years by the Federal Trade Commission: Specifically the court stated that

> ". . . the Supreme Court has held [*FTC* v. *A. E. Staley Co.,* 324 U.S. 746 (1945)] that in a price discrimination case (a Section 2(a) case) it is not an effective protection for an accused company to show that it operated a plan or system in order to combat its competitors' plans or systems; in other words, that in those cases *a plan to combat other plans is not an effective defense under the proviso in Section 2(b).*" See Appendix B, *infra,* pp. 19a-20a (Emphasis added).

The court of appeals chose to follow stringently the Commission's interpretation of *Staley,* i.e., that under no circumstances can meeting a plan with a plan be an adequate defense within the meaning of Section 2(b).

2. The *Callaway* decision by the Fifth Circuit obviously has substantial and controlling effect upon the instant case, for there can be no doubt that under the doctrine enunciated by the Fifth Circuit the instant case was wrongly decided by the Court of Appeals for the District of Columbia. In this regard

the Court's attention is respectfully invited to pages 21 through 23 of the Petition for a Writ of Certiorari in this case wherein the same essential considerations were presented which the Fifth Circuit set forth to vindicate the right of a respondent to establish a 2(b) defense by utilizing defensive plans or systems. In particular, petitioner cited Commissioner Elman's dissenting opinion in *Callaway Mills Co.*, CCH Trade Reg. Rep. ¶ 16,800 at 21,761, (Dkt. 7638, 1964). In his dissent it was pointed out that the vice condemned in the *Staley* case was not the use of a system or plan, *per se,* but rather, that the particular system offered in defense was an illegal, collusive price-fixing instrumentality which would have been independently prohibited aside from any Section 2(b) considerations (basing points, phantom freight, etc.).

3. Throughout the *Exquisite Form* proceedings, especially in the Petition for a Writ of Certiorari, petitioner has urged an abandonment of the *per se* approach and an adoption of a rule of reason in construing the parameters of the 2(b) defense. Prior to the *Callaway Mills* and *Cabin Craft* joint opinion, the lodestar of the rule of reason approach had been the decision in *Forster Mfg. Co.* v. *Federal Trade Commission,* 335 F. 2d 47 (1st Cir. 1964) *cert. denied,* 380 U.S. 906. *Forster* enunciated a "common sense" standard. For a discussion of this case, and the rule of reason, see the Petition, pp. 15-16 and the Reply Brief, pp. 9-11.

The recent pronouncement of the Fifth Circuit provides a well reasoned elaboration of how the rule of reason should apply in a context of plan meeting plan. The stark contrast of the *per se* approach taken by the *Exquisite Form* court and the rule of reason approach

taken by the *Callaway Mills* court is clear from the following statements by those courts in discussing plan meeting plan as a defense within Section 2(b). The *Exquisite Form* court of appeals stated that

> ". . . it is not an effective protection for an accused company to show that it operated a plan or system in order to combat its competitors' plans or systems; . . . a plan to combat other plans is not an effective defense under the proviso in Section 2(b)." See Appendix B. *infra,* p. 20a.

The Court of Appeals for the Fifth Circuit in *Callaway Mills* expressly disagreed:

> "We find this reasoning to be erroneous for the following three reasons. First, there is nothing wrong *per se* with *adopting* a 'pricing system' used by competitors. Secondly, the Commission completely disregarded the realities of the competitive conditions prevalent in the carpeting industry. Thirdly, the Commission failed to give proper consideration to the undisputed facts of the case." Slip Opinion, pp. 13-14; See Appendix A, *infra,* p. 12a.

The identity of the issues in *Exquisite Form* and *Callaway Mills* has been recognized by the Commission. The Commission's Reply Brief in the Fifth Circuit quoted the holding just cited in *Exquisite Form* while urging the Fifth Circuit to rule, as the District of Columbia Circuit had done, that *per se,* plan cannot be used to meet plan.[3]

4. In addition to its holding that plan meeting plan is outside the scope of the Section 2(b) defense, the

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[3] The Reply Brief discussed Exquisite Form's argument in the District of Columbia Circuit Court which quoted Commissioner Elman's dissent in the *Callaway Mills* decision by the FTC. To show that Exquisite Form's argument was not accepted by the court, the Reply Brief quoted the court's holding that, *per se,* Section 2(b) does not permit plan meeting plan. See *Cabin Crafts, Inc.* v. *Federal Trade Commission* (5th Cir. No. 21,500), Commission's Reply Brief, pp. 3-4.

Commission, in its *Exquisite Form* decision, added dictum to the effect that even if plan could be met with plan, the plan used by Exquisite Form was unavailing. This conclusion was reached after subjecting the plan to a mechanical comparison of its bare terms and conditions with the many other cooperative advertising plans in evidence. On its face this was a patent attempt, with the benefit of hindsight, to shore up the exclusionary rulings of the hearing examiner which have been catalogued in detail in the Petition herein. See Petition, p. 21, n. 11; see also discussion pp. 20-24.

Petitioner's purpose in attempting to elicit the information noted in footnote 11 of the Petition was to demonstrate that it had acted reasonably and prudently in attempting to meet its competition in good faith. This rule of reason approach would have elicited information tending to establish the marketplace realities extant in the brassiere industry. This is precisely the type of information which would be allowed under the rule of reason approach of the Fifth Circuit in *Callaway Mills.*

Petitioner attempted to adduce proof of its competitors' activities under its rule of reason approach, *inter alia,* by subpoenaing executives of six of its largest competitors as well as an executive of the Advertising Checking Bureau who was a qualified expert in this specialized area.[4] The court dismissed such evidence

[4] The six executives were from the following companies: Jantzen (JA 320), Bali (JA 328), Maidenform (JA 334), Warner (JA 337), Lovable (JA 339), Playtex (JA 348); Advertising Checking Bureau (JA 238). This is in addition to customers who were called. See Reply Brief, n. 6, p. 14. Compare the Brief in Opposition in the instant case, p. 10, wherein it is asserted that "Petitioner requests no subpoenas and made no showing that witnesses were unavailable".

as being insufficient to make out the defense. Thus it is apparent that the court of appeals, like the Commission, was applying a *per se* approach to the defense which is precisely what the *Callaway Mills* decision condemns.

In *Callaway Mills* the court rejected the Commission's traditional empirical approach to the defense of plan meeting plan because it

> "would require the petitioners to engage in *exhaustive* cost studies on the multitude of carpets on the market *before they are actually sold and before any discounts are given.* Such a procedure would be burdensome, unreasonable, and practically unfeasible. Even assuming petitioners could successfully forecast the prices at which their competitors were going to sell, they could not *possibly* determine how much each purchaser would buy during the year from each manufacturer in order to determine the size of the competitor's discount." Slip Opinion, pp. 14-15; See Appendix A, *infra,* p. 13a (Emphasis in original).

Ironically, the reasoning and language of the Fifth Circuit just referenced is virtually interchangeable with the position taken by the petitioner herein when it attempted to show this Court how unrealistic and sophistic the Commission's position has been, both in theory and practice.

> "A seller simply cannot get the type information that the Commission requires. . . .[C]ompetitors provide for cooperative advertising pursuant to multi-termed 'plans', the terms of which change frequently. . . .[M]ost . . . plans require that a series of ads be placed before mathematical calculation of the seller's participation with respect to any one ad is computed. *Not even the seller or his buyer may know what the final allowance is*

going to be. Yet the Commission would require a seller trying to meet his competition to specifically meet the prior offer, i.e., to know what neither his competitor or customer knows." Petition, pp. 16-17 (Emphasis in Petition).

5. *Staley* was decided by this Court in 1945, yet since July of 1964 three different appellate courts have sought to glean from that opinion the meaning of the Section 2(b) defense. These appellate courts have developed two diametrically opposed views on the matter.[5] First, the Court of Appeals for the First Circuit, in *Forster,* reversed the Federal Trade Commission and took a common sense approach in determining the degree of foreknowledge a competitor must have concerning competing offers before responding to them. The linchpin of this common sense approach is the fundamental impossibility of ascertaining with mathematical certitude the realities of a given market and the activities of competitors as required by the Commission's formalistic approach. Next, the Court of Appeals for the District of Columbia Circuit *adopted* the Federal Trade Commission's *per se* approach that plan meeting plan is beyond the scope of the Section 2(b) defense and rejected, as without significance, the standard articulated in *Forster.* Finally, and most recently, the Court of Appeals for the Fifth

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[5] Other Circuits have touched upon whether, *per se,* a plan cannot be used to meet plan. See *Standard Motor Products, Inc.* v. *Federal Trade Commission,* 265 F. 2d 674 (2nd Cir. 1959), *cert. denied,* 361 U.S. 826, questioning the use of a plan to meet a competitor's plan; but see *Balian Ice Cream Co.* v. *Arden Farms Co.,* 231 F. 2d 356 (9th Cir. 1955), *cert. denied,* 350 U.S. 991, *rehearing denied,* 351 U.S. 928, and *General Gas Corp.* v. *National Utilities of Gainesville,* 271 F. 2d 820 (5th Cir. 1959) which favorably discuss plan meeting plan as a defense within the meaning of Section 2(b).

Circuit, in basic agreement with the philosophy of the First Circuit, has refused to enforce the Commission's *per se* rejection of plan meeting plan defenses under Section 2(b) and has met the problem of proof by utilizing a rule of reason based on the fundamental impossibility of competing effectively under the unrealistic standards heretofore imposed by the Federal Trade Commission.

This present posture of a most important aspect of antitrust law pleads for immediate resolution. The immediacy of this need is best demonstrated by a number of pending cases which are being guided by the traditional view of the Commission. Only two weeks ago a hearing examiner applied the Commission-District of Columbia Circuit interpretation of *Staley*:

> "The evidence indicates . . . that Surprise's discriminatory allowances were part of an over-all plan devised by it to combat the plans of competitors (*Exquisite Form* Opinion, pp. 11-16). The Staley rationale—that the use of a plan or system to meet or combat a plan or system of a competitor cannot be justified under Section 2(b) —is just as applicable here as it was in *Exquisite Form.*" *In the Matter of Surprise Brassiere Co., Inc. et al.,* Docket No. 8584, Initial Decision, June 10, 1966, p. 100.

Under the *Forster-Callaway Mills* approach and as urged in the Petition for Certiorari herein, such a casual dismissal of the *only* effective method of competition in the brassiere industry is wholly erroneous because it injects a *per se* approach where only reason can rule.

CONCLUSION

Because of the sharp conflict between the court of appeals in the instant case and the positions taken by the First and Fifth Circuits on the same important question of antitrust law, this petition for rehearing should be granted and a writ of certiorari should issue to the United States Court of Appeals for the District of Columbia Circuit.

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

PEYTON FORD
Counsel for Petitioner

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21499

CALLAWAY MILLS COMPANY and CALLAWAY MILLS, INC., *Petitioner,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

No. 21500

CABIN CRAFTS, INCORPORATED, *Petitioner,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

Petitions to Review and Set Aside Orders of the Federal Trade Commission.

(June 13, 1966.)

Before JONES, WISDOM and GEWIN, Circuit Judges.

GEWIN, Circuit Judge: These two cases present petitions to review certain orders and opinions of the Federal Trade Commission filed pursuant to Section 5(c) of the Federal Trade Commission Act, 15 U.S.C.A. §45(c), and Section 11 of the Clayton Act, 15 U.S.C.A. § 21.

The petitions present common questions of law and substantially similar facts and therefore are considered together in this opinion.[1]

The facts surrounding the petition of Callaway Mills Company and Callaway Mills, Inc.[2] (Callaway) may be outlined as follows: Callaway is a Georgia corporation which manufactures a wide variety of textile products. Prior to 1950 it was engaged primarily in the manufacture of cloth goods such as towels, draperies, industrial fabrics and similar products. In the manufacture of some of those products, such as bedspreads and bathmats, it used a process known in the industry as "tufting." Instead of weaving an entire piece of cloth at one time, a machine pushes a continuous loop of yarn through a previously manufactured backing and secures it by applying a coating of latex to the underside. During 1950, Callaway successfully adapted this process to the manufacture of carpeting. This accomplishment had a pronounced effect on the carpeting industry, since the tufting process is much more rapid and thus less expensive than the standard weaving process which had been used by older carpet manufacturers for many years. Very soon Callaway began producing tufted carpeting in competition with the "old line" manufacturers who also began using the tufting process along with their weaving process.

For years prior to 1950 and continuing until these proceedings were instituted, the "old line" manufacturers had been granted annual graduated volume discounts to their purchasers who were mostly retail department and

[1] These are two of twelve administrative proceedings brought by the FTC against members of the carpeting industry for alleged violations of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C.A. § 13(a).

[2] Callaway Mills, Inc. is a wholly owned subsidiary of Callaway Mills Company.

home furnishing stores. These discounts ranged from 1 to 5 per cent depending upon the total dollar amount a retailer purchased during a given year. They were usually granted on the total sales of all products from the manufacturer; and "chains" or "buying groups" were allowed to "pool" their purchases to benefit from a higher volume. Naturally, the more a retailer purchased, the less the carpeting cost per square yard. The important effect of the discounts was that they gave a competitive advantage to those retailers who were large enough to buy in volumes which qualified for the higher discount percentages.

This litigation brings into focus a rather unusual situation in two respects. First, the record clearly demonstrates an effort on the part of small manufacturers to enter the market and compete with large companies who have been in the carpeting business for many years. Usually, cases of this type reveal an effort on the part of large, powerful and dominant manufacturers to exert economic pressure on small ones. Secondly, the record further shows clearly that the carpet industry has been entrapped to a degree by the well established practice of granting volume discounts which they all apparently wish to discontinue. As early as 1939 there was a concerted effort by the industry to end the practice. This effort was nullified, however, when the Justice Department filed suit seeking to enjoin the manufacturers from terminating the practice on an industry-wide basis. A consent decree was obtained which forbade any agreement or conspiracy "to refrain from giving volume allowances or rebates to purchasers of rugs and carpets." *United States* v. *Institute of Carpet Manufacturers, et al.*, 1940-43 CCH T.C. ¶ 56097 (S.D. N.Y. 1941). Thus, the situation has persisted, and buyers have continued to demand the discounts. No manufacturer has been able to abandon the system alone. It is obvious that all competitors must follow the system or abandon it together,

but they are forbidden to do so by the above-mentioned decree. The existence of the practice, full knowledge as to the amount of the discounts, the fact that such discounts are a real and vital factor in the carpeting business, and that customers demand such discounts is a matter of common knowledge to all who are acquainted with the industry.

Prior to 1955 Callaway had refused to give its purchasers volume discounts. However, the record reveals that the purchasers were exerting increasing pressure on it to do so. As a result, Callaway adopted the following schedule of discounts:

Aggregate Annual Purchases	Discount
$ 5,000- 7,999	1%
8,000-14,999	2%
15,000-29,999	3%
30,000-49,999	4%
50,000 and over	5%

The *dollar volume levels* at which the discount percentage figures were set in Callaway's schedule were appreciably lower than those of its competitors, but the schedule of its competitors embraced woven as well as tufted carpets as hereafter discussed.

In 1959, the Federal Trade Commission filed a Complaint against Callaway (and a number of the other manufactures; see footnote 1) charging it with violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C.A. § 13(a),[3] because it had dis-

[3] § 13(a):

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or

criminated in price between purchasers of commodities of like grade and quality to the detriment of competition between them.[4] Prior to the hearing below, Callaway and Counsel supporting the Complaint entered into a written stipulation whereby Callaway admitted the Section 2(a) violation and agreed to limit its case to proof of a "meeting the competition" defense as set out in Section 2(b) of the Act.[5] The parties also agreed to limit the scope of the inquiry to the sample trade areas of Cleveland Ohio; Cincinnati, Ohio; and Boston, Massachusetts.

During the hearing Callaway produced as witnesses a number of agents for purchasers who testified substantially to the following: Callaway's line of tufted carpeting was "competitive" with the tufted carpeting in the

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resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them:"

[4] The complaints against both Callaway and Cabin Crafts alleged "primary line" as well as "secondary line" price discriminations. However, by stipulation the cases were prosecuted solely for "secondary line" violations.

[5] "(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

competitors' lines when sold at comparable list prices. Callaway's competitors had been giving annual volume discounts for a number of years prior to Callaway's entry into the market. Prior to its granting of discounts, Callaway's carpeting cost more per square yard than comparable carpeting in competitors lines. The retailers could not pass the higher cost of Callaway's carpeting to the customer because carpeting sells at established pricing points, usually 5 cents under the dollar, i.e., $4.95, $6.95, $7.95 per square yard. The retailers pressured Callaway to give discounts by warning that they would otherwise discontinue buying from it.

Callaway officials testified that Callaway had resisted giving discounts. Officers of the company spent a great deal of time considering the proper system of discounts. They arrived at the decision to grant them only in order to maintain their present position in the market. The officials also clearly explained why they set the percentage discount figures at lower volume levels than the competition by showing that (1) Callaway makes only tufted carpeting which has never accounted for more than 40-45% of the total carpeting market, while the competition sold both tufted and woven carpeting which accounts for the remainder of the market;[6] (2) Callaway sold in the $4.95 to $13.95 price range while competitors sold carpets which retailed as high as $49.95 and more. Because of resulting smaller volume sales to each customer Callaway had to reduce its volume levels in the schedule to a point where the ***net per unit price*** after discounts of any given style of carpet would be approximately the same as that of comparable carpeting of the competition. Finally, Callaway produced extensive charts showing that net prices for its carpets of es-

[6] Also Callaway granted discounts only on carpeting while competitors granted them on other items such as "seconds," scraps, and institutional carpeting.

sentially the same style, design and other similar factors, (less discounts and early payment allowances) were substantially equal to those of the competition. *There was no rebuttal evidence whatsoever presented by Counsel supporting the Complaint.*

The hearing examiner found that Callaway had made out a defense under Section 2(b) and dismissed the Complaint. The Commission, with Commissioner Elman dissenting,[7] reversed the hearing examiner on the grounds that Callaway (1) failed to carry its burden under the Section 2(b) defense because it failed to show that its products were of "like grade and quality" as those of the competition; (2) had adopted a "formal pricing system" instead of meeting each individual competitive situation as it arose; and (3) had actually undercut the competition by granting discounts at lower volume levels. *Callaway Mills,* Docket No. 7634, — FTC — (1964). Callaway then perfected this appeal.

Cabin Crafts, Inc. (CC) is also a Georgia corporation, which prior to 1950 had been in the textile business. After Callaway adapted the tufting process to the manufacture of carpeting, CC also entered the tufted carpeting field. CC's pre-Complaint experience was similar to Callaway's in most respects except that after on actual decline in sales during 1955, it offered the following lower discount schedule after Callaway:[8]

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[7] Chairman Dixon wrote the majority opinion in which Commissioner MacIntyre concurred. Commissioner Anderson concurred in the result. Commissioner Reilly did not participate, and Commissioner Elman dissented.

[8] These discounts were given *solely* on tufted carpeting, and only when expressly *requested* by a customer. Furthermore, buying groups were not allowed to "pool" their purchases. CC is a much smaller company than Callaway.

Aggregate Annual Purchases	Discount
Up to $ 9,999	0%
$10,000- 19,999	1%
20,000- 34,999	1½%
35,000- 49,999	2%
50,000 or more	2½%

Prior to the hearing before the examiner, CC also stipulated the existence of a prima facie case under Section 2(a) and limited its proof to a section 2(b) defense. During its hearing, CC offered the testimony of one Mr. Brenner, its Vice-President for Sales, who had a wide and varied experience in the carpeting industry both with CC and previously with its competitors. Mr. Brenner testified that purchasers had asked for discounts and its sales were "threatened" because of CC's failure to give them.[9] He further stated that discounts were given on a smaller percentage basis than either Callaway or the other competitors because that was all CC could afford. He also testified that CC's line of carpeting was competitive and, indeed, "interchangeable" with that of its

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[9] Mr. Brenner testified as follows:

> "Q. Did each of these buyers tell you personally he would not increase his purchases of your carpets because you did not have a volume rebate?
>
> "A. In answering that I would have to say that not only would they not increase the purchases, the possibilities of increasing the purchases, but the possibilities of holding our own level at the time."

And further:

> "What actually happened, with two comparable fabrics, the dealer was making less of a markup on our fabric, consequently he was promoting and pushing the other fabric, on which he was making a better profit."

competitors' products at the same price level.[10] *Again Counsel supporting the Complaint offered no rebuttal evidence.*

The examiner found for CC and dismissed the Complaint. Again, however, the Commission overruled the examiner and found that CC had (1) failed to show its line was of "like grade and quality" with that of its competitors; (2) adopted a "formal pricing system"; and (3) failed to produce "price lists" conclusively showing it was meeting the equally low prices of the competition. *Cabin Crafts, Inc.*, Docket No. 7639, — FTC— (1964). CC then perfected its appeal.

I. *"Like Grade and Quality"*

The Commission held in both its Callaway and CC opinions that the petitioners failed to carry their burdens of showing that their price discriminations were a "good faith" attempt to meet an equally low price of a competitor because each had failed to present evidence that its carpets at various price levels were "comparable in materials and construction to the products of competitors at similar price levels." In its holding in *Callaway* (and by reference in CC) the Commission stated the following at — FTC —:

> "A discriminatory lower price set to 'meet' the price of inferior goods is in effect an undercutting of the latter price, and such a discriminatory price cannot be characterized as defensive, for it goes beyond

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[10] Mr. Brenner testified as follows:

"Q. Now, sir, do you make carpets which, so far as the customer is concerned, are interchangeable with competitors carpets, or are your carpets totally different?

"A. In basis they are interchangeable.

"Q. Now, sir can the consumer tell the difference between your $6.95 carpet and somebody else's $6.95 carpet?

"A. Not of similar fabrics, no."

the provocation which engendered it. There is no showing in this record that respondents' carpets at various price levels were comparable in materials and construction to the carpets of competitors at similar price levels. Rugs and carpets are not fungible goods of the nature of cement, oil or glucose. The quality and saleability of carpeting depend upon many variables and it offends our common sense to completely ignore all such possible differences and hold, sans affirmative evidence, as did the hearing examiner, that carpeting made by Callaway to sell at a certain price level is similar in grade and quality to all carpeting made by Callaway's competitors to sell at approximately the same level. As a matter of fact, there is some evidence in this record that certain of the favored buyers did not consider the goods they were buying from Callaway as either 'competitive' or 'comparable' with goods they were buying from others. Respondents should have introduced proof as to the comparative quality and saleability of their goods and the competitive goods allegedly defended against. Lacking such proof the finding that Callaway was meeting the price of its competitors is speculative.

"Both the courts and the Commission have consistently denied the shelter of the defense to sellers whose products, because of intrinsic superior quality or intense public demand, normally commands a price higher than that usually received by sellers of com petitive goods. For example, the defense will not lie when the price of Lucky Strikes is dropped to the level of a 'poorer grade of cigarettes,' *Porto Rican American Tobacco Co.* v. *American Tobacco Co.*, 30 F. 2d 234, 237 (2d Cir. 1929), *cert. denied*, 279 U.S. 858 (1929); when the price of Budweiser beer is dropped to match the price of 'nonpremium' local beers, *Anheuser-Busch, Inc.*, 54 F.T.C. 277, *set aside*

for other reasons, 265 F. 2d 677 (7th Cir. 1959), *rev'd.* 363 U.S. 536 (1960), *again set aside for other reasons* 289 F. 2d 835 (7th Cir. 1961); and, when the price of a 'premium' automatic control is set above the price of less acceptable controls, *Minneapolis-Honeywell Regulator Co.,* 44 F.T.C. 351, *rev'd. on other grounds,* 191 F. 2d 786 (7th Cir. 1951), *cert. dismissed* 344 U.S. 206 (1952)."

In other words, the Commission ruled that it cannot be determined whether there had been a "good faith" effort to meet the equally low price of a competing product without clear proof that petitioner's products were of "like grade and quality"[11] with that of the competition because it is always possible that, as in the previous FTC cases cited by the Commission, the public *was willing to pay more* for their products than those of competitors.

The Commission committed error on this point by equating "grade and quality" with "saleability." The two are not synonymous. It is obvious that the consuming public, being far less aware of such factors as "craftsmanship and materials" than professional carpetmakers, cannot easily discern differences in quality between comparable carpeting.[12] Furthermore, the public is greatly influenced by such intangibles as color, design, display, advertising, and similar factors. So long as petitioners conclusively show that their products at various price levels generate public demand (or "saleability") substantially equivalent to that of competitors' carpeting at the same price levels, considerations of "grade and quality" become unnecessary, "and indeed superfluous, for the most "grade and quality" can do is tend to show "saleability." See *Italian Ice Cream Co.* v. *Ardens Farms Co.,* 231 F.2d 356 (9 Cir. 1955). Moreover, the Commission completely ignored abundant unrebutted

[11] The phrase "like grade and quality" appears in Section 2(a) only; there is no reference to it in Section 2(b).

[12] See footnote 10.

testimony in both cases which clearly demonstrated or would support the inference that petitioner's products at the various price levels possessed qualities of "saleability" comparable to that of its competitors' products. It also surprisingly ignored *substantial* evidence actually showing "like grade and quality." For instance, Mr. Brenner in the CC hearing said its carpets were "interchangeable" with those of the competition.

II. *"Formal Pricing System"*

The Commission further ruled that by granting volume discounts, petitioners simply *adopted* a "formal pricing system" instead of meeting each individual competitive situation as it arose. Therefore, petitioners failed to show a "good faith" effort to meet a competitor's price. Implicit in the rationale of the Commission's opinion is the suggestion that Callaway and CC should have adopted a policy of lowering their prices on carpeting in a wholly piecemeal fashion, meeting the exact price at which any given competitor sold a certain type or style of carpeting to any particular customer. It relies on *FTC* v. *Cement Institute*, 333 U.S. 683, 92 L.ed. 1010 (1948); *FTC* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746, 89 L.ed. 1338 (1945).

We find this reasoning to be erroneous for the following three reasons. First, there is nothing wrong *per se* with *adopting* a "pricing system" used by competitors. Secondly, the Commission completely disregarded the realities of the competitive conditions prevalent in the carpeting industry. Thirdly, the Commission failed to give proper consideration to the undisputed facts of the case.

It is important to examine in some detail the manner in which carpeting is sold. Each manufacturer makes a wide variety of carpeting of different quality to be sold by retailers at various "pricing points" which range from a low of $2.95 up to prices exceeding $49.95 per square

yard in progressive increments of $1.00 per square yard. Often, there is a difference in construction, design, patterns, colors, or materials between carpets selling at the same price level, presenting an infinite variety from which customers may choose. All the different "styles"[13] or types of carpets taken together make up a manufacturer's "line." When one multiplies the broad number of styles with the number of manufacturers (approximately fifty to sixty), the number of different types of carpeting is quite large. According to the record, with minor exceptions, a retailer shows a manufacturer's "line" of goods to the public and then orders his requirements on a sale-by-sale basis. To price each style of its carpeting with specific reference to all the different styles of every competitive line, as suggested by the Commission, would require the petitioners to engage in *exhaustive* cost studies on the multitude of carpets on the market *before they are actually sold and before any discounts are given.* Such a procedure would be burdensome, unreasonable, and practically unfeasible. Even assuming petitioners could successfully forecast the prices at which their competitors were going to sell, they could not *possibly* determine how much each purchaser would buy during the year from each manufacturer in order to determine the size of the competitor's discount.

As the Supreme Court said in *FTC* v. *A. E. Staley Mfg. Co., supra,* "the statute does not place an impossible burden upon sellers." In the circumstances and under the facts of this case, Callaway and CC could in "good faith" attempt to meet the competition by granting similar volume discounts especially since no workable alternative is evident.

We have found no authority which holds that in all circumstances the allowance of volume discounts accord-

[13] We use "style" to mean a carpet with a certain (1) material, (2) quality, (3) color, (4) pattern, etc.

ing to a plan or "system" as distinguished from "individual competitive" responses is condemned per se. Clearly, this is not a "basing-point" case. *FTC* v. *Standard Oil Co.*, 355 U.S. 396 (1958). It is only when no "reasonable and prudent person" would conclude that the adopted system is a reasonable method of meeting the lower price of a competitor that it is condemned. That decision must be made on a case-by-case basis. The adoption of the competitor's system in *Staley* and *Cement* had the effect of raising prices to certain purchasers through "phantom" freight charges and thus creating *greater* discrimination than necessary. Obviously, that was not a "good faith" effort. Such is not the case here. Under the totality of the circumstances, the discount system, *thoughtfully tailored by both petitioners to meet their individual problems in the market,* was a mature and reasonable approach to a very real and difficult competitive problem; and petitioners carried their burden of showing "good faith."

III. *Undercutting*

In complete disagreement with the findings of the trial examiner and material, substantial and unrebutted evidence to the contrary, the Commission made the following statement in *Callaway:*

> "It is no answer to contend, as do the respondents and the hearing examiner, that so-called 'old line' companies have a broader product line (i.e., both woven and tufted carpeting) and that respondents' qualifying purchase volumes must hence be lower. The plain fact is that respondents are offering lower net prices on an equivalent volume of purchases and this constitutes undercutting, not meeting, a competitor's prices."

Such is simply not the case, and we reject the Commission's conclusions as arbitrary. *Minneapolis-Honeywell Reg. Co.* v. *FTC,* 191 F.2d 786 (7 Cir. 1951). The

evidence shows that Callaway sold less to its customers because it had a smaller, less expensive line; and, therefore, it had to lower its qualifying volumes so that a customer would receive the same percentage discount it would have received from a competitor from whom it would ordinarily be buying larger quantities, such additional quantities usually resulting from the fact that most competitors sold both woven and tufted lines. Furthermore, charts in the record reveal that the effect of the lower volume levels was to meet, not undercut the competition.[14]

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[14] The difficulty inherent in meeting the volume discounts of competitors under the "meeting competition" defense was recognized by the Report of the Attorney General's National Committee to Study the Antitrust Laws, from which we quote:

> "An incidental undercutting of the prices quoted by others, when in the course of genuinely meeting one particular competitor's equally low price offer, hence should not invalidate a seller's defense. At the same time, a seller responding to a rival's price should not be confined to quotations for a precisely equivalent quantity of goods." At p. 183.
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> • • • • •
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> "The Committee further believes that a seller should not be forced to meet a competitor's equally low price to the last fraction of a cent. Potent factors other than naked price determine a customer's choice among competing offers—especially with consumer goods reflecting a broad range of quality, design, or brand. While basic homogeneous commodities such as crude oil, steel and cement normally present slight problems of consumer differentiation, electrical appliances or chemicals, for example, involve a broad range of significant competitive factors other than price. Here a mechanical test would defeat the objective of permitting a realistic equalization of an actual competitive situation. An inflexible cent-for-cent rule would enable a seller of the preferred commodity in fact to undercut the price for a less desirable product, or conversely, deprive the seller of a less popular product of the full benefit of the 'meeting competition' defense. We therefore urge a flexible rule which regards the nominal price of the rival product as only a presumptive boundary of a seller's permissible price

IV. *"Price Lists"*

Finally, the Commission ruled that CC failed to carry its burden under Section 2(b) because it failed to produce "price lists" comparing its net prices after discounts with those of the competition. It said:

> "Stated otherwise, it is necessary for us to compare the net prices offered by respondent with the net prices of its competitors which it was purportedly meeting to determine the existence of the requisite good faith. To accomplish this result, we must relate the discounts to the prices of comparable merchandise to determine whether respondent's net price was lower than those of competitor. Such a result is impossible without the price lists of respondent and its relevant competitors."

We disagree. CC need not show its prices were *in fact* equal to those of competitors, but must only show facts which would lead a "reasonable and prudent person" to believe that the granting of lower prices would in fact meet the equally low price of a competitor. *FTC* v. *A. E. Staley Mfg. Co., supra.*

Although he was fully credited as a reliable expert witness, Complaint Counsel suggests that the testimony of Vice-President Brenner of Cabin Crafts should be rejected because it was based on hearsay testimony or

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reduction under the 'meeting competition' proviso, adjustable up or down upon satisfactory proof by the person questioning its reliability. In practical operation, such a test in some circumstances necessarily must permit a seller of a less accepted brand to cut substantially below the more popular product's price. Conversely, as the Commission has readily recognized, the seller of the premium commodity sometimes must not go down to the price level of the lesser product. In each case, the heart of the matter is whether actual competition, not merely a nominal price quotation, is equalized." At pp. 183-184.

that his testimony was elicited by leading questions. We disagree. This witness was shown to be widely experienced in the industry over an extended period of years and to be thoroughly familiar with the commodities, market prices, trade practices, and the competitive problems involved. His testimony clearly established that Cabin Crafts is one of the small manufacturers which has undertaken to enter the carpet manufacturing business in recent years. For a number of years it offered no discounts but was constantly confronted with the demands of powerful purchasers to grant them in accordance with the industry-wide practice. It instituted the practice reluctantly and then only after its chief competitor, Callaway, commenced the practice. Even then Cabin Crafts did not permit chain stores to combine the purchases of all stores under common ownership as was ordinarily done. Its discounts were much less than those generally granted in the industry. In our view, the evidence sufficiently supports the 2(b) defense interposed by Cabin Crafts, and to hold otherwise would not only constitute a misinterpretation of the record but serious injustice would result. We conclude that CC had ample reason to believe that the granting of the discounts would only meet the competition.

A reading of all the records and briefs convinces us the Commission erred in its decision in these two cases and that such decisions should be reversed and the respective orders vacated. Although only four issues were raised and decided on this appeal, nothing herein should be accepted as either an affirmation or rejection of any of the other legal conclusions drawn by the Commission in its opinions.

The orders are VACATED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18524

EXQUISITE FORM BRASSIERE, INC.,
A CORPORATION, *Petitioner*

v.

FEDERAL TRADE COMMISSION, *Respondent*

On Petition to Review an Order of the
Federal Trade Commission

Decided July 2, 1965

Mr. Peyton Ford for petitioner. *Mr. Urban A. Lester* also entered an appearance for petitioner.

Mr. Lester A. Klaus, Attorney, Federal Trade Commission, with whom *Mr. James McI. Henderson*, General Counsel, and *Mr. E. K. Elkins*, Attorney, Federal Trade Commission, were on the brief, for respondent. *Mr. Thomas F. Howder*, Attorney, Federal Trade Commission, also entered an appearance for respondent.

Before PRETTYMAN and BASTIAN, Senior Circuit Judges, and BURGER, Circuit Judge.

PRETTYMAN, *Senior Circuit Judge*: This is the second time this controversy has been in this court. It is a petition to review a decision of the Federal Trade Commission. Exquisite Form was charged with violating Section

2(d) of the Robinson-Patman Act[1] by making discriminatory advertising allowances to customers. The Commission found a violation. The company appealed to this court. We affirmed the Commission on this point.[2] However another controversy at that stage was whether or not a defense, meeting the competition in good faith, which was authorized by a proviso in Section 2(b) of the statute, was authorized to a person guilty of discriminating in violation of Section 2(d) of the statute, which declares it to be unlawful for a person to pay anything for the benefit of a customer for services or facilities provided by such customer, unless the payment or consideration is equally available to all other customers. The Commission had held that the defense was not available in such cases. We held that it is available and remanded the case for the Commission to hear Exquisite Form on that defense.[3] Hearing was held, and the Commission held that Exquisite Form had not established the defense by proof. The present case is on review of that decision.

Exquisite Form in the present case essentially premises its position upon the proposition that in a Section 2(d) case, if the accused company establishes that its competitors have plans or systems whereby they make advertising allowances to their customers, any company in the industry can combat such systems by inventing and operating a member or plan of its own. Exquisite Form states a number of points, but all of them arise from or are enveloped in the proposition just stated. This, as it phrases the matter, is the crux of the case. Admittedly the Supreme Court has held[4] that in a price discrimina-

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[1] 49 STAT. 1527 (1936), 15 U.S.C. § 13(d) (1963).

[2] Exquisite Form Brassiere, Inc. v. FTC, 112 U.S. App. D.C. 175, 301 F. 2d 499 (1961), *cert. denied*, 369 U.S. 888 (1962).

[3] *Ibid.*

[4] FTC v. A. E. Staley Co., 324 U.S. 746 (1945).

tion case (a Section 2(a) case) it is not an effective protection for an accused company to show that it operated a plan or system in order to combat its competitors' plans or systems; in other words, that in those cases a plan to combat other plans is not an effective defense under the proviso in Section 2(b). The Court held that in such cases the combative act had to be a specific act aimed at a lower price on the part of a competitor in "individual competitive situations, rather than * * * [in] a general system of competition."[5] Exquisite Form argues that that rule cannot apply to the advertising allowance practices in the brassiere industry, because of the factual characteristics of that industry and the practices in it.

We think the doctrine of *Staley* must be applied here. There are differences, of course, between a price discrimination (Section 2(a)) case and a case involving advertising allowances. But we are not shown that any such difference goes to the basic thesis involved in the statute or to the rationale of *Staley*. We are not shown any compelling reason for different treatment.

Exquisite Form also contends that, even if the doctrine of *Staley* applies, its proof satisfied the requirements of that case. The only evidence which related to individual competitive situations consisted of a table which set forth the dates of retailers' advertisements of Exquisite Form products and competitors' products. There was no testimony which explained how this table related to company policy. The Commission found that Exquisite Form's evidence was insufficient to support its contention. We agree with the Commission.

Affirmed.

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[5] *Id.* at 753.